84-158

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ROCKY B. FISHERIES, INC.,
an Oregon Corporation,
JOHNNIE BROWN and DAVID BROWN,
Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC.,
an Oregon Corporation;
JOHN DUDREY with his law firm partners
FLOYD A. FREDRICKSON, LLOYD W.
WEISENSEE, PETER C. McCORD and JAY M.
FOUNTAIN; LAWRENCE F. FINNERAN with
his law firm partners JERRY O. LESAN and
KIRK JOHANSEN,
Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

JURISDICTIONAL STATEMENT

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7/20/84

STEVENS-NESS LAW PUB. CO., PORTLAND, OR. 97204 7-84

QUESTION PRESENTED

An Oregon statute allows the summary, ex parte, pre-judgment seizure of fishing boats which are the source of fisherman's livelihood for non-admiralty, original construction liens without any:

a) pre-seizure notice;
b) pre-seizure hearing;
c) extraordinary situations existing;
d) a writ being issued by a judge;
e) sworn affidavits of the claimant;
f) post-seizure hearing; or
g) adequate bond being posted.

The question is whether such process violates due process rights under the Fourteenth Amendment to the Constitution of the United States.

LIST OF PARTIES

The caption contains the names of all parties to the proceedings.[1] However, 28 U.S.C. § 2403(b) may be applicable and this brief will be served on the Attorney General of Oregon.

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[1]Appellants Johnnie Brown and David Brown, Oregon fishermen, are the sole shareholders of Rocky B. Fisheries, Inc., an Oregon corporation, which has no parent company, subsidiary or affiliate.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

Rocky B. Fisheries, Inc., an Oregon corporation, Johhnie Brown and David Brown,

Appellants,

v.

North Bend Fabrication & Machine, Inc., an Oregon corporation; John Dudrey with his law firm partners Floyd A. Fredrickson, Lloyd W. Weisensee, Peter C. McCord and Jay M. Fountain; Lawrence F. Finneran with his law firm partners Jerry O. Lesan and Kirk Johansen,

Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

Rocky B. Fisheries, Inc., Johnnie Brown and David Brown appeal from the

judgment of the Court of Appeals of the State of Oregon, holding that Oregon's boat construction lien statutes (Or. Rev. Stat. 783.010 to 783.090) are constitutional and not violative of appellants' due process rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Oregon Court of Appeals, which appears in the appendix hereto, pp. A-1 to A-38, infra, is reported at 66 Or. App. 625, 676 P.2d 319 (1984).

The trial court's order and judgment dated June 14, 1982 are not reported. They are reprinted in the appendix hereto, pp. A-39 to A-47, infra.

GROUNDS OF JURISDICTION

Rocky B. Fisheries and its two shareholders, Oregon commercial fishermen, brought an action at law for damages

under 42 U.S.C. § 1983, challenging the in rem and ex parte seizure of their fishing boat pursuant to Or. Rev. Stat. 783.010 to 783.090.[2] Appellants contended that the seizure was accomplished without due process of law and attacked the constitutionality of Oregon's boat construction lien statutes. The Oregon Court of Appeals upheld the challenged statutes, affirming the trial court's judgment which granted North Bend's motion for summary judgment and the individual appellees' motion to dismiss.

This Court has jurisdiction by appeal pursuant to 28 U.S.C. § 1257(2). The Oregon Court of Appeals filed its opinion on January 25, 1984. See p. A-2, infra. Appellants' petition for review

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[2]Appellants also sought recovery under theories of conversion, abuse of process and interference with contractual relations.

was denied by the Oregon Supreme Court on April 24, 1984. 297 Or. 82 (1984). See pp. A-38 to A-39, infra. A notice of appeal to this Court was timely filed with the Oregon Court of Appeals and duly served on all parties on June 20, 1984. See pp. A-47 to A-49, infra. A copy was served on the Oregon Supreme Court, which was possessed of the record, on June 21, 1984.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. * * *"

Oregon Statutes:

The full text of the relevant Oregon statutes, Or. Rev. Stat. 783.010 to 783.170, is set forth in the Appendix (pp. A-50 to A-55, infra). The statutory provisions most directly at issue in this appeal include the following:

Or. Rev. Stat. 783.010:

> Every boat or vessel used in navigating the water of this state or constructed in this state is liable and subject to a lien:
>
> * * * *
>
> (2) For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owner, or with any person having them employed to construct, repair or launch such boat or vessel, on

account of labor done or materials furnished by mechanics, tradesmen or others in the building, repairing, fitting and furnishing or equipping such boat or vessel, or on account of stores and supplied furnished for the use thereof, or on account of premiums for insurance placed on or with respect to such boat or vessel, or on account of launchways constructed for the launching of such boat or vessel.

* * * *

Or. Rev. Stat. 783.030:

Any person having a demand as mentioned in ORS 783.010, instead of proceeding for recovery thereof against the master, owner, agent or consignee of the boat or vessel, may at his option commence an action against such boat or vessel by name.

Or. Rev. Stat. 783.040:

Any person wishing to commence an action against a boat or vessel shall file his complaint against such boat or vessel by name with the clerk of the circuit court of the county in which the boat or vessel may lie or be. The complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued, and shall be verified by the plaintiff or some credible person for him.

Or. Rev. Stat. 783.050:

> Whenever the complaint is filed, the clerk shall issue a warrant thereon, commanding the sheriff to seize the boat or vessel mentioned in the complaint, with her tackle, apparel, and furniture and retain the same until discharged from such custody by due course of law.

STATEMENT OF THE CASE

Appellants Johnnie and David Brown are Oregon commercial fishermen. Their $600,000 boat the Rocky B. was constructed in Oregon, was launched November 24, 1979 and was documented and licensed as a boat on November 27, 1979. North Bend supplied services and materials after the boat was launched, from December 13, 1979 to May 6, 1980. An outstanding balance of $5,410.04 was due when North Bend through its attorneys claimed a nonmaritime lien on the boat pursuant to Or. Rev. Stat. 783.010(2), claiming that labor and material were provided in

connection with the original construction of the boat.

On August 1, 1980, the ex parte, in rem seizure of the Rocky B. occurred. North Bend filed a complaint and warrant for the arrest of the boat. The complaint, which was not supported by affidavits, consisted of mere conclusory allegations. The complaint did not allege any "extraordinary circumstances" to justify summary seizure. North Bend posted a $10,000 bond on the $600,000 boat. The bond was to protect the county sheriff against wrongful seizure, not to protect appellants. With no pre-seizure notice or hearing of any nature whatsoever being afforded appellants, the clerk of court issued a warrant based upon the conclusory allegations in the complaint, and the county sheriff seized the vessel. Immediately after the seizure, appellants requested release of the Rocky B., but

North Bend refused. The seizure of the Rocky B. deprived appellants of their ability to earn their livelihood.

Rocky B. Fisheries and its two shareholders filed suit challenging the seizure of the Rocky B., alleging in their complaint that the seizure constituted a violation of their civil rights (42 U.S.C. § 1983). The trial court granted the individual appellees' motion to dismiss for failure to state facts sufficient to constitute a claim and North Bend's motion for summary judgment, holding the challenged seizure procedures and statutes constitutional.[3]

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[3]The resulting judgment dismissed all claims except one; that the seizure of the boat was illegal because the Oregon court lacked jurisdiction since jurisdiction vested exclusively in the federal courts. The judgment articulates that there is no just reason for delay, and appellants' appeal was taken pursuant to Or. R. Civ. P. 67B.

Appellants appealed, and the Oregon Court of Appeals affirmed. See pp. A-1 to A-38, infra. The Court of Appeals held that due process rights under the Fourteenth Amendment to the United States Constitution do not apply to the prejudgment seizure of a boat, even in an admittedly non-admiralty context, since "The Sniadach [Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969)] line of cases . . . are inapposite to the seizure of a vessel under ORS 783.030 et seq. . . ." Rocky B. Fisheries v. No. Bend Fab., 66 Or. App. 625, 634, 676 P.2d 319 (1984), (A-25, infra). The Court of Appeals held that the boat owners' only right, when there is an ex parte summary seizure of the boat which is the source of their livelihood, is to a judicially-legislated, post-seizure hearing, which the boat owner must request, although he has

not notice of any such right.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents important and substantial federal questions concerning the constitutional prerequisites for the prejudgment seizure of property, which seizure deprives the owners of their ability to earn their livelihood.

It cannot be emphasized too strongly that this is not an admiralty case. Oregon courts have no admiralty jurisdiction because such jurisdiction is vested solely and exclusively in the federal courts. All parties to this case agree that the lien at issue is a non-admiralty lien. It is a lien claimed by defendants to be for the original construction of a boat.

Notwithstanding the due process developments over the past few decades, the Oregon Court of Appeals has held that

due process rights under the Fourteenth Amendment to the United States Constitution do not apply to the prejudgment seizure of a fishing boat. The Court of Appeals has held, in resurrecting an illogical nineteenth century legal principal, that seizure of one's property is sufficient notice to satisfy constitutional law requirements. Also, the Oregon court has held that no pre-seizure hearing is required. The Court of Appeals has held that the owners' only right, when there is an ex parte summary seizure of the boat which is the source of their livelihood, is to a judicially-legislated, post-seizure hearing notwithstanding that: a) the statutes provide for no such hearing; b) the boat owners are given no notice of such hearing and; c) for any such hearing to occur it must be requested by the boat owner.

Under the Court of Appeals' decision, there are no safeguards to prevent mistake in seizure. A creditor can present a complaint consisting of mere conclusory allegations, unsupported by affidavits, and have a writ issued without any prior notice or hearing to the owner and with no meaningful judicial participation in the writ. The complaint need not even allege an "extraordinary situation"[4] to justify summary sei-

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[4]This Court outlined the "extraordinary situations" exception in Fuentes v. Shevin, supra:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, 401 U.S. [371], at 379 [91 S. Ct. 780, at 786, 26 L.Ed.2d 113]. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a

zure. The Court of Appeals has rewritten the law of due process in this state, contrary to multiple U.S. Supreme Court decisions which establish plaintiffs' rights. See, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed.2d 751 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 1895 (1974); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349

(n. 4 cont.)

> special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U.S. at 90-91 [92 S. Ct. at 1999-2000]. (Footnotes omitted.)

(1969). The Oregon court has ignored these binding precedents.

The Court of Appeals held that due process rules do not apply to an in rem state court seizure of tangible personal property when the purpose of the seizure is to create a lien. This holding is inconsistent with the rule of Sniadach and its progeny. As recognized by this Court, whenever an owner is deprived of the use of his property during the pendency of litigation, due process requires prior notice and prior hearing regardless whether jurisdiction is in rem or in personam. The Oregon court ignores Green v. Lindsey, 456 U.S. 444, 102 S. Ct. 1874, ____ L.Ed.2d ____ (1982) which holds:

> '[A]ll proceedings, like all rights, are really against persons.' In this case, appellees have been deprived of a significant interest in property . . . In light of this deprivation, it will not suffice to recite that because an action is in

> rem, it is only necessary to serve notice upon the thing itself." 102 S. Ct. at 1878-1879.

This Court consistently has extended due process protections to actions based on in rem jurisdiction. See Green, supra; Sniadach, supra.

There is no logical basis for distinguishing a fisherman's boat from any other type of tangible personal property in regard to notice requirements. The Oregon Court of Appeals, in deciding that prior notice is not required where the purpose of the seizure is the perfection of a lien, made the following startling statements:

> "Despite the fact that notice by seizure has been criticized of late, it is particularly appropriate in the seizure of a seagoing vessel, the identity or whereabouts of whose owners may be unknown, or whose owners may be outside the jurisdiction * * * * [I]f prior notice were required, it would in many instances enable the owner to frustrate the perfection of the lien and its priority by putting out to sea or alienating the vessel." Rocky B.

Fisheries, supra, 66 Or. App. at 632 (A-19 to A-20, infra).

The analysis is in error for several reasons. Oregon law does not create a lien on a "seagoing vessel." The Victorian, 24 Or. 121, 32 P. 1040 (1893). This is because admiralty liens are solely and exclusively cognizable under federal admiralty law. Even if it did, the potential for frustration of a lien does not justify inadequate notice. Moreover, the Court of Appeals mires itself in illogic because there is no basis for distinguishing a fishing boat from any form of movable personal property, some of which, such as airplanes, are far more rapidly transported.

From a due process standpoint, the key question is the extent of interference with one's property, not the potential for frustration of the attachment. The seizure of a commercial fishing

vessel is analogous to the garnishment of wages, in that both impose a tremendous hardship on wage earners with families to support. As this Court has held in regard to garnishment of wages:

> "Where the the taking of one's property is so obvious, it needs no extended argument to conclude that absent prior hearing this prejudgment garnishment procedure violates fundamental principles of due process." (Citations omitted.) Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1960).

The Oregon court attempts to de-emphasize the impact of the interference with property in this case by analogizing the seizure of a fishing boat with the filing of a construction lien. The analogy is inappropriate, as the Court of Appeals comes close to recognizing later in its opinion: "filing a lien against real property is not quite as drastic as seizing a vessel. * * * The analogy is by no means complete * * *." Rocky B.

Fisheries, supra, 66 Or. App. at 631 (A-15 to A-16, infra). When a construction lien is filed against real property, the only harm to the owner is the restraint on alienation. The owner is not deprived of the use of the property during the pendency of the litigation. The owner retains the full use and enjoyment of the premises. However, when a fishing boat is seized, not only is there a restraint on alienation, the owner is deprived of the use and enjoyment of the vessel. When the vessel is a commercial fishing vessel, the owner loses the ability to earn his or her livelihood. Such a drastic remedy, allowed before judgment, requires all of the procedural protections provided by the Fourteenth Amendment.

The Court of Appeals' reasoning in validating a patently unconstitutional statutory scheme was to incorporate into

Oregon law the unique principles of federal admiralty law. The Court of Appeals followed Merchants National Bank v. Dredge General G. L. Gillespie, 663 F.2d 1338 (5th Cir. 1981), cert. dis. 456 U.S. 966, 102 S. Ct. 2263 (1982) in which the Fifth Circuit upheld the constitutionality of Federal Admiralty Rules C and E, which permit the in rem seizure of seagoing vessels for enforcement of federal maritime liens.

Federal admiralty law is unique and is not relevant to a state lien statute which purports to allow seizure of boats for original construction liens. Oregon has no admiralty law jurisdiction. The Victorian, 24 Or. 121, 32 P. 1040 (1893). The reasons for permitting ex parte, in rem seizures under federal admiralty law do not apply to Oregon's boat construction lien statute. The risks attendant to one supplying labor or materials to a

foreign vessel which may be in port for only hours are different from the risks attendant to one supplying labor or materials for a boat under construction, which is obviously not sailable. Admiralty law deals with seagoing vessels once complete, Oregon law deals only with vessels under construction in Oregon.

Federal admiralty law, as presented to the Fifth Circuit in Merchants, supra, provides far greater due process protections than Oregon's boat construction lien law. The court in Merchants emphasizes that Admiralty Rules C and E are, in conjunction with the local rules, constitutional because they provide minimal due process safeguards. Of key importance to the court was Local Admiralty Rule 21, in the United States District Court for the Western District of Louisiana, which specifically guaranteed a prompt post-seizure hearing and thus

provided an opportunity to strike down an improper attachment. Merchants, supra, 663 F.2d 1344. That rule provided:

> Whenever there is an arrest in rem or whenever property is attached, the party arrested or any person having the right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or a manifest want of equity on the part of the libellant, be entitled to an order requiring the libellant to show cause instanter why the arrest or attachment should not be vacated. Merchants, supra, 663 F.2d at 1344.

The rule specifically provides for an "instanter" hearing, and shifts the burden to the lien claimant to show cause why the arrest or attachment should not be vacated.[5]

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[5]This Court need not reach any admiralty law questions in the instant case. The only reason admiralty law is discussed is because the Court of Appeals erroneously applied admiralty law principles to purely local seizure statutes in its efforts to find such statutes constitutional.

No such provisions are found in Oregon's construction lien statutes (Or. Rev. Stat. 783.010 to 783.090), although the Court of Appeals attempted to engraft onto Or. Rev. Stat. 783.090[6] such provisions. However, Or. Rev. Stat. 783.090 merely allows the owner to have the vessel released if he posts a bond. There is no provision for a hearing to contest the validity of the seizure.[7]

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[6]Or. Rev. Stat. 783.090 states that the owner may secure immediate release of the vessel by entering into "an undertaking in favor of plaintiff, with sufficient security, to be approved by the judge or clerk of the court in which the action is pending."

[7]The Court of Appeals practices understatement in noting that the statutory "section may not articulate the procedure to be followed as completely as we might desire." Rocky B. Fisheries, supra, 66 Or. App. at 633 (A-21, infra).

There is not even a provision for the owner to file affidavits or evidence contesting the seizure. The burden of proof is not shifted to a lienor to establish the validity of the seizure.

In addition, there is no mechanism of any nature whatsoever to advise an owner that he has any right to a hearing. There is no way that the owner of a seized boat would ever know of the bond statute unless he read ORS 783.090. The owner is served with no papers at all which advise him that a hearing can occur. The contention that this bond

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(n. 7 cont.)

Being "bound to uphold the constitutionality of legislation when it is reasonably susceptible to an interpretation that will permit it" (66 Or. App. at 633 (A-21 to A-22, infra)), the Court of Appeals engaged in judicial legislation.

statute provides a hearing for the owner is illogical and illusory.[8]

The need for a hearing is graphically illustrated by the facts of the instant case. The seizure complaint filed in the Coos County Circuit Court by North Bend alleged that the materials were provided from December 13, 1979 to May 6, 1980. The Rocky B. was launched, documented and licensed by November 27, 1979. If a hearing had occurred, and the court had reviewed the pleadings, the court could have learned that all of the materials were provided after the Rocky B. was launched, documented and licensed.

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[8]The Oregon court chides appellants for not "attempt[ing] to avail themselves of that procedure." Rocky B. Fisheries, supra, 66 Or. App. at 634 (A-23, infra). In so doing the Oregon court chides appellants for being unaware of a procedure which did not exist before the court had an opportunity to "construe" 66 Or. App. at 634 (A-22, infra) the existence of that same procedure.

Oregon has no legal authority to seize a vessel for materials and supplies provided to an already constructed and seagoing vessel. The Victorian, supra. Therefore, the court would have immediately released the Rocky B. from seizure.[9]

CONCLUSION

The decision of the Oregon Court of Appeals repudiates fundamental due process principles. The questions presented

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[9]The Court of Appeals, in validating a harsh and unconstitutional remedy, fails to recognize that Oregon law provides creditors with an alternative lien remedy, which is constitutional and simple. This alternative lien remedy is a non-possessory chattel lien which fully protects the creditor, and provides notice and hearing to a boat owner. Also, this alternative remedy would permit seizure, pursuant to Or. Rev. Stat. 29.020 to 29.075, pp. A-50 to A-64, infra, (now Or. R. Civ. P. 81-85), pp. A-64 to A-77, infra, if extraordinary situations existed, such as a specific threat that the boat would be removed from this state.

by this appeal are substantial. Rocky B. Fisheries and its two shareholders urge this Court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

DATED this 20th day of July, 1984.

Respectfully submitted,

MARTIN, BISCHOFF, TEMPLETON, BIGGS & ERICSSON

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APPENDIX

Appendix A

Opinion of Oregon Court of Appeals

No. CA A25230

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ROCKY B. FISHERIES, INC. et al,
Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC. et al,
Respondents.

Appeal from Circuit Court, Multnomah County.

Richard L. Barron, Judge.

Argued and submitted July 8, 1983.

Barbara J. Gazeley, Portland, argued the cause for appellants. With her on the briefs were John L. Langslet and Martin, Bischoff, Templeton, Biggs & Ericsson, Portland.

J. P. Graff, Portland, argued the cause for respondents. With him on the brief was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P.J.

Affirmed.

Filed January 25, 1984

BUTTLER, P.J.

This action at law for damages arose out of the in rem seizure of a fishing vessel, the Rocky B, pursuant to ORS 783.010 et seq. Plaintiffs contend that defendants are liable under 42 USC § 1983, because the seizure was accomplished without due process of law, and are also liable for failure to comply with the requirements for issuance of provisional process specified in ORS 29.020 et seq (now codified in ORCP 81-85). They also seek recovery under theories of conversion, abuse of process and interference with contractual relations. The trial court granted defendant North Bend's motion for summary judgment

and the individual defendants' motion to dismiss; plaintiffs appeal from the resulting judgment dismissing all claims except one, which was added as a separate claim after the court had ruled on the motions.[1]

In May, 1979, plaintiffs Brown, now the sole shareholders of plaintiff Rocky B. Fisheries, Inc., began construction of a fishing vessel, the Rocky B. Construction was financed by Southern Oregon Production Credit Association (PCA), which secured its loan of more than $427,000 with what plaintiffs characterize as

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[1]The remaining claim alleges that the seizure of the vessel was illegal, because the Oregon court lacked jurisdiction and that jurisdiction vested exclusively in the federal court. The judgment, pursuant to ORCP 67B, articulates reasons for determining that there is no just reason for delay.

"preferred ship's mortgages." Defendant North Bend supplied services and materials on an open account for the construction, fitting, furnishing and equipping of the vessel. An outstanding balance of $5,410.04 was due when North Bend, through its attorneys, defendants Finneran and Dudrey, claimed a nonmaritime lien on the vessel in that amount pursuant to ORS 743.010(2).

On August 1, 1980, North Bend filed an action against the Rocky B, seeking a judgment against it for the balance due, and moved for an order authorizing the arrest of the Rocky B. On August 5, 1980, after requiring North Bend to post a bond, a circuit court judge ordered the clerk of the court to issue a warrant for the seizure of the vessel. The warrant was issued by the clerk, and the vessel

was seized by the sheriff. Plaintiffs learned of the seizure immediately and demanded that defendants release it. Because the seizure of the vessel constituted a default on the mortgage, PCA commenced an action in federal district court to foreclose its mortgage. The marshal, acting pursuant to an order of that court, seized the vessel and currently holds it under arrest.

Under ORS 783.010, every boat or vessel used[2] in the waters of, or

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[2]To the extent that ORS ch 783 purports to authorize state court actions with respect to maritime liens, it conflicts with the exclusive admiralty jurisdiction of the United States District Courts. Therefore, in The Victorian, 24 Or 121, 32 P 1040 (1893), the Supreme Court construed the provisions of ORS ch 783 to apply only to nonmaritime liens, i.e., liens with respect to labor and materials used in the original construction of ships.

constructed in, the state is liable and subject to a lien, so far as relevant:

> "(1) For wages due to persons employed, for work done or services rendered on board such boat or vessel.
>
> "(2) For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owner, or with any person having them employed to construct, repair or launch such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen or others in the building, repairing, fitting and furnishing or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of premiums for insurance placed on or with respect to such boat or vessel, or on account of launchways constructed for the launching of such boat or vessel."

Under ORS 783.030 and 783.040, a creditor claiming a lien under ORS 783.010 may commence an in rem state court action directly against a vessel by filing a complaint setting forth his demand in all its particulars in the cir-

cuit court of the county in which the vessel is located. ORS 783.050 provides that when the complaint is filed, the clerk of the court shall issue a warrant commanding the sheriff to seize the vessel named in the complaint. Seizure of the vessel under that statutory procedure is a prerequisite to the perfection of a lien under ORS 783.010. Paddack v. Rasmussen, 294 Or 599, 604, 660 P2d 677 (1983).

On return of the warrant for the arrest of the vessel, "proceedings shall be had in circuit court against the boat or vessel seized, in the same manner as if the action had been commenced against the person on whose account the demand accured." ORS 783.060. The master, owner, agent or consignee of the vessel may appear and answer the complaint, ORS

783.070, but if no appearance is made, the plaintiff may obtain a default judgment against the vessel, which is the defendant. ORS 783.080. ORS 783.090 provides that the master or other interested person may have the vessel released prior to adjudication of the underlying claim by entering into an undertaking in favor of the plaintiff, with sufficient security to be approved by the judge or clerk of the court.

Plaintiffs contend that the prejudgment seizure of the Rocky B under chapter 783 violated their due process rights under the Fourteenth Amendment to the United States Constitution, giving rise to a claim under 42 USC § 1983. Their catalog of perceived constitutional defects in chapter 783 is drawn from the deficiencies exposed in four Supreme

Court cases that dealt with the constitutionality of state laws governing the seizure of a debtor's property before judgment: Sniadach v. Family Finance Corp., 395 US 337, 89 S Ct 1820, 23 L Ed 2d 349 (1969); Fuentes v. Shevin, 407 US 67, 92 S Ct 1983, 32 L Ed 2d 556 (1972); Mitchell v. W. T. Grant Co., 416 US 600, 40 L Ed 2d 406, 94 S Ct 1895 (1974), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 US 601, 95 S Ct 719, 42 L Ed 2d 751 (1975).

In Sniadach v. Family Finance Corp., supra, the Court invalidated a Wisconsin garnishment statute which allowed a creditor, without prior notice or hearing, to attach the wages of a debtor pending the outcome of the creditor's claim. Similarily, in Fuentes v. Shevin, supra, the Court struck down Florida and Pennsyl-

vania prejudgment replevin procedures that allowed creditors to seize goods in which they claimed an interest without providing the debtor with prior notice or an opportunity to be heard. The general rule to be gleaned from these cases is that, except in "extraordinary situations," whenever an owner is to be deprived of the use of his property during the pendency of litigation, due process requires notice and opportunity for an early hearing before a judicial officer.

In Mitchell v. W. T. Grant Co., supra, and North Georgia Finishing, Inc. v. Di-Chem, Inc., supra, the Court expanded that rule by holding that official seizures without prior notice and hearing or other safeguards against mistake violate due process. Mitchell upheld a Louisiana sequestration statute

which provided for the judicial issuance of a writ on the ex parte application of a creditor who claimed an interest in the property to be sequestered. Although no notice or opportunity for hearing was required prior to the issuance of the writ, the statute afforded other safeguards by requiring: (1) a sworn affidavit showing the creditor's claim and the right to repossession; (2) issuance of a writ authorizing the seizure by a judge rather than a court clerk; (3) a bond sufficient to compensate the debtor for damages caused by a wrongful seizure, and (4) an opportunity for the debtor to seek "immediate" dissolution of the writ, which must be ordered unless the creditor "proves the grounds upon which the writ was issued." 416 US at 606. In North Georgia, the court relied mainly on

Mitchell in invalidating a Georgia garnishment statute which authorized a court clerk to issue a writ of impoundment based on an affidavit containing only conclusory allegations. The statute attacked in North Georgia had none of the "saving" characteristics emphasized in Mitchell.

Relying on those precedents, plaintiffs here claim that the seizure of the Rocky B was deficient in several respects: (1) no pre-seizure notice or hearing was afforded plaintiffs; (2) the complaint filed by defendants consisted of bare conclusory allegations unsupported by an affidavit containing facts to support the claim; (3) there was no meaningful judicial participation in the issuance of the writ; (4) no "extraordinary situation" existed which would justi-

fy summary seizure,[3] and (5) no oppor-

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[3] In Fuentes v. Shevin, supra, the Supreme Court outlined the "extraordinary situatins" exception:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, 401 US [371], at 379 [91 S Ct 780, at 786, 26 L Ed 2d 113]. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 US at 90-91. (Footnotes omitted.)

Several federal courts have relied on this exception in upholding maritime seizures. See, e.g., Merchant's National Bank v. Dredge General G. F. Gillespie, 663 F2d 1338 (5th Cir 1981); Central Soya

tunity for a post-seizure hearing was provided.

The question is whether that line of cases applies to a chapter 783 proceeding, where the purpose of the statutory scheme is to permit the perfection of a statutory lien against a specific vessel and where any judgment that may be entered is against that vessel only and may be collected, if at all, from the sale of the vessel. ORS 783.110. The situation presented is somewhat analogous to a construction lien claimed by a materialman who provides material to a contractor in the construction of a commercial building. The owner may have

Co., Inc. v. Cox Towing, 417 F Supp 658 (ND Miss 1976); Olyesha Pipeline Service Co. v. Bay Ridge, 509 F Supp 115 (D Ala 1981), appeal dismissed 703 F2d 381 (9th Cir 1983); Karl Senner, Inc. v. M/V Acodian Valor, 485 F Supp 287 (ED La 1980).

paid the contractor in full, but the contractor may not have paid the laborers or materialmen. Those unpaid suppliers are entitled to a lien against the building, even though they have no claim against the owners. The lien may be perfected by a filing within the time permitted by ORS 87.035, and no notice is required either before or after filing, although failure to give the post-filing notice specified in ORS 87.039 precludes the lien claimant from recovering costs and attorney fees.

It is true that filing a lien against real property is not quite as drastic as seizing a vessel. However, the filing of a lien constitutes a restraint on the alienation of the property and may cause irreparable harm to the owner; for that reason, the lien

expires six months after it is filed, unless an action is commenced to foreclose it. ORS 87.055. There is no filing procedure under chapter 783, the statutory lien being perfected only by seizure, which must be accomplished within one year after the cause of action has accrued.

The analogy is by no means complete, but it suggests that in the context of due process there may be a weighing of the rights of the parties to determine whose due process has been denied. Under chapter 783, as in maritime liens, the concept that the vessel, apart from its owner, has incurred a liability is fundamental in the context of the arrest or seizure of vessels. Merchant's National Bank v. Dredge General G. F. Gillespie,

663 F2d 1338, 1345 (5th Cir 1981).[4] In Cordrey v. Steamship "Bee," 102 Or 636, 651, 201 P 202 (1921), the court quoted from Keating v. Spink, 3 Ohio St 105, 62 AD 214 (1893):

> "This statute, then, as stated by the court in the Canal-Boat Huron v. Simmons, 11 Ohio [459, 461 (1842)], "treats the boat as a person, and makes it responsible in its own name for all debts contracted for its use, and for all injuries committed against persons or property on board, by her officers or crew." The liability is upon the craft--the proceeding is against the craft--and the judgment operates alone upon the craft. Its seizure is indispensable to the jurisdiction of the court, and its continued custody, unless released upon bond and security, indispensably necessary to the further proceedings, after final judgment."

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[4]Although federal cases ruling on the constitutionality of procedures employed in maritime seizures are not authoritative in the context of a non-maritime seizure, they delineate the historical and practical distinctions between admiralty and common law and, by analogy, aid in determining the due process required in the present context.

The doctrine of the ship's liability, apart from that of its owner, and the concept that the lien creates an interest in the vessel do not immunize the procedure from the constraints of due process. However, as the Supreme Court observed in Mitchell v. W. T. Grant Co., supra, 416 US 610:

> "* * * [The] requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' Due process of law guarantees 'no particular form of procedure; it protects substantial rights.' 'The very nature of due process negates any concept of inflexible procedures universally applicable to any imaginable situation.' (Citations omitted.)"

The fundamental requisites of due process are adequate notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 313-16, 70 S Ct 652, 94 L Ed 865 (1970). If the procedures provided by chapter 783

meet those fundamental requirements, they should be upheld. Although there is no statutory requirement that the owner of the vessel be given notice of its seizure, in Cordrey v. Steamship "Bee," supra, 102 Or at 650, the court said that "seizure of one's property is notice to him of an invasion of his rights, calling upon him to defend." It held that failure to require written notice did not offend due process. Despite the fact that notice by seizure has been criticized of late, it is particularly appropriate in the seizure of a seagoing vessel, the identity or whereabouts of whose owners may be unknown, or whose owners may be outside the jurisdiction.

As the court stated in Cordrey v. Steamship "Bee," supra, 102 Or at 653:

> "* * * In the case of a seagoing vessel especially, which is constantly in charge of a master or other representative of the owner, or of the owner himself, the mere taking is such an invasion of property rights as to notify the owner as a practical matter, that he must defend. * * *"

It is reasonable to assume that the master of a vessel will notify the owner or the owner's insurer in the event of seizure. We cannot say that the notice provided by chapter 783 is inadequate because it is not provided prior to the seizure of the vessel. There is no lien prior to seizure and, if prior notice were required, it would in many instances enable the owner to frustrate the perfection of the lien and its priority by putting out to sea or alienating the vessel. The lien provided by ORS 783.010 gives a lienor a sufficient interest in the vessel to detain it so that the lien can be

perfected and judicially enforced. For those reasons, we conclude that neither pre-seizure notice nor hearing is constitutionally required.

Plaintiffs challenge the statute's lack of a statutory provision for a prompt post-seizure hearing, but they ignore ORS 783.090. Although that section may not articulate the procedure to be followed as completely as we might desire, it expressly allows an owner, agent or consignee to secure the immediate release of a vessel by entering into "an undertaking in favor of plaintiff, with sufficient security, to be approved by the judge or clerk of the court in which the action is pending." We are bound to uphold the constitutionality of legislation when it is reasonably susceptible to an interpretation that will per-

mit it. City of Portland v. Welch, 229 Or 308, 316, 364 P2d 1009, 367 P2d 403 (1961). Just as the court in The Victorian, supra, n 2, limited the application of what is now ORS ch 783 to non-maritime liens in order to avoid conflict with the Congressionally mandated exclusive federal jurisdiction over maritime liens, we should construe ORS 783.090 to comport with due process requirements, if it is susceptible to such a construction.

It is clear that the statute permits the owner, after seizure, to request the judge to approve the security he must post in order to obtain the release of the vessel. Given that express statutory procedure, we construe the statute to permit the owner to obtain a post-seizure hearing to challenge the legality of the

seizure, the validity of the claim or the amount claimed in order to fix the amount of the undertaking necessary to release the vessel. Accordingly, the statutory scheme is not invalid on its face. Neither was it unconstitutionally applied in this case. Here, plaintiffs did not attempt to avail themselves of that procedure. Therefore, we hold that the provisions of ORS chapter 783 and the procedures employed in the seizure of the Rocky B did not violate plaintiffs' due process rights. The trial court did not err in dismissing plaintiffs' claim under 42 USC § 1983.[5]

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[5]42 USC § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be sub-

Plaintiffs also contend that the requirements for issuance of provisional process set forth in ORS 29.020 et seq (now codified in ORCP 81-85) apply to the seizure of a vessel pursuant to chapter 783 and that defendants are liable for failure to follow those procedures. As we stated in Huntington v. Coffee Associates, 43 Or App 595, 603 P2d 1183 (1979):

> "ORS 29.020 to 29.075 were enacted in 1973 in response to the U.S. Supreme Court decisions in Fuentes v. Shevin, 407 US 67, 92 S Ct 1983, 32 L Ed 2d 556 (1972), and Sniadach v. Family Finance Corp., 395 US 337, 89 S Ct 1820, 23 L Ed 2d 349 (1969), which invalidated statutory provisional remedies in many states, in-

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jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *"

> cluding Oregon, as not meeting the requirements of due process because they permitted prejudgment attachment, garnishment or repossession provisional processes without a prior hearing.
>
> "In adopting ORS 29.020 to 29.075, the legislature established procedural requirements for all types of provisional process, with respect to all of which judicial intervention is necessary and, except for extraordinary circumstances, notice and hearing are required. * * *"

ORS ch 783 provides a complete set of procedures whereby a creditor may acquire, perfect and enforce a lien in a narrowly defined and historically unique area of law. The Sniadach line of cases, in response to which ORS 29.020 et seq were enacted, are inapposite to the seizure of a vessel under ORS 783.030 et seq, where seizure is necessary both to perfect a creditor's interest in the property and to invoke the court's jurisdiction. Moreover, the provision for pre-

seizure notice and hearing mandated by Oregon's provisional process statutes might defeat a creditor's ability to perfect and enforce a statutory lien against the vessel by providing an opportunity for the vessel to abscond from the court's jurisdiction. Given those statutory purposes for the seizure of a vessel, the process does not appear to be provisional in the ordinary sense of that term any more than does the filing of a construction lien.[6] For these reasons,

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[6]Prejudgment seizures of property to which the requirements for provisional process apply are limited by the definition of "provisional process." Former ORS 29.020(5) (repealed by Or Laws 1981, ch 898, § 53) defined "provisional process" to mean:

> "[1] attachment under ORS 29.110 to 29.400, [2] garnishment under such attachment, [3] replevin or claim and delivery under ORS 29.080 to 29.095 or [4] any other legal or

we conclude that the procedures set forth in ORS 29.020 et seq are inapplicable to the seizure of a vessel pursuant to ORS 783.010 et seq.

Plaintiffs' reliance on Lent v. Robinson, 47 Or App 579, 615 P2d 338 (1980), is misplaced. In Lent, we indicated that the plaintiffs, who had

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> equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or restrain use or disposition of, property in which the defendant claims an interest." (Emphasis supplied.)

The defendant in an action under ORS 783.030 is the vessel, not its owners. The emphasized language in the quoted statute suggests that the legislature intended the requirements of provisional process to apply only to in personam or quasi in rem proceedings against a debtor, not to strictly in rem proceedings against property. We express no opinion as to the effect of those statutes when the owners of the vessel are parties defendant and a judgment is sought against them personally.

obtained a prejudgment attachment and garnishment, were required to comply with the 1973 statutory requirements for provisional process, even when the claimed purpose of the attachment was to obtain quasi in rem jurisdiction. The question presented in Lent was whether the trial court's order quashing the writ of attachment was appealable. We held that it was not, because the trial court was without authority to issue the writ in the first place. The plaintiffs contended that the court had authority, because it was necessary for the court's jurisdiction. The record revealed, however, that the defendant had been served by substituted service, sufficient to obtain jurisdiction over him, but not sufficient to give him the personal notice required by the provisional process statutes.

Former ORS 20.065(2) (repealed by Or Laws 1981, ch 898, § 53). The plaintiffs relied on the pre-1973 statutes authorizing prejudgment attachment without notice (former ORS 29.110, repealed by Or Laws 1981, ch 898, § 53), which had not been expressly repealed by the 1973 legislation. We concluded, however, that, because the 1973 legislation conflicted with the prior legislation, it controlled to the extent that it conflicted with the earlier statutory scheme. See Davis v. Wasco IED, 286 Or 261, 272, 593 P2d 1152 (1979). Attachment and garnishment are clearly provisional processes covered by the 1973 statutory scheme; seizure of a vessel to perfect a statutory lien is not. We find no conflict between the provisional process statutes and chapter 783.

Plaintiffs contend that the "wrongful" seizure of the Rocky B constituted conversion and that defendants are liable to plaintiffs for the full value of the vessel. Because we have concluded that the defendants were within their rights in seizing the vessel, plaintiffs have not stated a claim for conversion.

Plaintiffs further contend that defendants' conduct in causing the seizure of the Rocky B constituted an abuse of process. Abuse of process is the perversion of a legal procedure to accomplish an ulterior purpose when the procedure is commenced in proper form and with probable cause. Larsen v. Credit Bureau, 279 Or 405, 408, 568 P2d 657 (1977); Kelly v. McBarron, 258 Or 149, 154, 482 P2d 187 (1971). Dean Prosser identified the essential elements of the tort:

> "'* * * [F]irst, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. * * *' Prosser, Law of Torts 857, § 121 (1971). (Footnotes omitted.)" Quoted in Larson v. Credit Bureau, supra, 279 Or at 408.

Plaintiffs appear to argue that defendants asserted the priority of North Bend's lien over PCA's mortgage in order to coerce PCA to pay plaintiffs' indebtedness to North Bend. Taking those allegations as true, however, they fail to state a claim for abuse of process.

North Bend had the right to attempt to collect the amount owed it and had the right to assert and perfect its lien by seizing the vessel. It was also entitled to a judicial determination whether its lien was prior to that of PCA. If its lien was not prior to PCA's mortgage, there was no way it could "coerce" the latter into paying North Bend, unless PCA preferred to pay it rather than have the vessel sold subject to its mortgage. If, on the other hand, North Bend had priority, PCA would be required to pay off that lien in order to protect its junior lien. If threats by North Bend to foreclose constitute coercion, that is part of the process, not an abuse of it.

There is nothing unusual about holders of liens commencing foreclosure proceedings in the hope that they may per-

suade another lienor that may have priority so that the other lienor will buy them out. The commencement of such proceedings does not become an abuse of process merely because the initiator hopes to obtain a benefit short of a foreclosure sale. Restatement (Second) of Torts, 475, § 682, comment b (1977). It is absurd to say, then, that a lienor claiming priority has acted improperly in doing what the law requires to effectuate its rights--seizing the vessel and asserting its priority.

Although defendants are willing to "concede" that it might be an abuse of process if defendants had seized the vessel to acquire a lien they knew was inferior to PCA's and had falsely asserted priority in order to compel PCA to pay off plaintiffs' debt, plaintiffs have not

alleged that defendants asserted the priority of North Bend's lien in the knowledge or reasonable belief that it was inferior to that of PCA.[7]

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[7]In plaintiffs' third claim for relief, they assert:

> "In furtherance of defendants' improper purpose, defendants claimed an illegal and wrongful lien on the 'Rocky B' which defendants asserted was superior to the Preferred Ships Mortgage of PCA, which forced PCA to file its own foreclosure action on the 'Rocky B' in order to protect its interests. Further, defendants told PCA that they would harass and annoy it and plaintiffs with their wrongful lien claim until PCA paid the claimed debt, and would persist in their wrongful claim of lien even though they were told their lien was wrongful, and their procedures were improper. After PCA filed its foreclosure action, which foreclosure was solely and exclusively caused by defendants' wrongful seizure, defendants persisted in their claim of lien."

We have already concluded that the procedure whereby the lien was claimed was not wrongful or illegal. As asserted in this

Defendants' motions for dismissal and summary judgment on this claim were properly granted.

Under the terms of the mortgage between plaintiffs and PCA, the seizure of the Rocky B constituted an act of default. Plaintiffs allege that before the seizure of the vessel they and PCA had agreed that, although the first payment on the mortgage was due in October, 1980, PCA would not foreclose, but would allow plaintiffs to make payments from their profits in the 1980-81 fishing season, which commenced in December, 1980. Defendants' actions in causing the seizure of the Rocky B allegedly interfered

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context, we conclude that the words "wrongful and illegal" must refer to the status of the lien itself and not to the fact that defendants have asserted a superior lien.

with those agreements, to plaintiffs' detriment.

In order to state a claim for intentional interference with a business relationship, facts must be alleged that show an intentional interference with the plaintiff's business relationship, that the interference was for an improper purpose or was by improper means and that, as a result, the plaintiff was injured beyond the fact of the interference itself. Straube v. Larson, 287 Or 357, 361, 600 P2d 371 (1979); Erlandson v. Pullen, 45 Or App 467, 471, 608 P2d 1169 (1980).

Plaintiffs have failed to allege sufficient facts to entitle them to relief under this theory. In Straube v. Larson, supra, 287 Or at 361, the court stated:

> "* * * [T]o be entitled to go to a jury, plaintiff must not only prove that defendant intentionally interfered with his business relationship but also that defendant had a duty of non-interference, i.e., that he interfered for an improper purpose rather than for a legitimate one, or that defendant used improper means which resulted in injury to plaintiff. * * *"

In support of this claim for relief, plaintiffs allege only that the seizure of the Rocky B was "wrongful and illegal," as a result of which PCA "was forced to" foreclose its lien. We have already decided that defendants' seizure was authorized, and there is no allegation that defendants seized the vessel for the purpose of causing PCA to commence foreclosure proceedings. In the absence of an allegation that defendants sought to accomplish the seizure for other than a legitimate purpose, e.g., to enforce its lien pursuant to ORS 783.010,

defendants' motions for dismissal and summary judgment were properly granted.

The trial court did not err in granting the individual defendants' motion to dismiss or North Bend's motion for summary judgment.

Affirmed.

Appendix B

Denial of Petition for Review by Oregon Supreme Court

CA A25230
SC S30477

IN THE SUPREME COURT
OF THE STATE OF OREGON

ROCKY B FISHERIES INC
BROWN,JOHNNIE
BROWN,DAVID
Petitioners

v.

NORTH BEND FABRIC & MACHINE
DUDREY,JOHN
FREDRICKSON,FLOYD A
WIESENSEE,LLOYD W
MCCORD,PETER C
FOUNTAIN,JAY M
FINNERAN,LARENCE E
LESAN,JERRY O
JOHANSEN,KIRK
Respondents

ORDER DENYING REVIEW

IT IS HEREBY ORDERED that petitioner's petition for review is denied.

DATE: April 24, 1984.

/s/EDWIN J. PETERSON
CHIEF JUSTICE

Appendix C

Order of Coos County Circuit Court Judge Richard L. Barron sitting by designation in Multnomah County Circuit Court, dated June 14, 1982

No. A8110-06552

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ROCKY B. FISHERIES, INC., an Oregon corporation; JOHNNY O. BROWN and DAVID BROWN,

Plaintiffs,

vs.

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation; JOHN DUDREY with his law firm partners, FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN,

Defendants.

ORDER ON MOTIONS TO
DISMISS/STRIKE AND
FOR SUMMARY JUDGMENT

The motions of defendants North Bend Fabrication & Machine, Inc., and defendants John Dudrey, et al., having come on regularly to be heard April 28, 1982,

before the Honorable Richard L. Barron, Judge of the Circuit Court of the State of Oregon for the County of Coos sitting in Multnomah County by designation, said motions being (1) by North Bend Fabrication for an Order granting summary judgment against portions of plaintiffs' complaint and (2) by defendants John Dudrey, et al., for an Order dismissing and/or striking portions of plaintiffs' complaint; plaintiffs appearing by Barbara J. Gazeley, of their attorneys, defendant North Bend Febrication appearing by Kent C. Whitaker, of its attorneys, and defendants John Dudrey, et al., appearing by Kenneth E. Roberts and John J. Fennerty, of their attorneys, and the court having examined the records, files and all of the memoranda submitted by the parties, and being fully advised,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Defendant North Bend Fabrication & Machine, Inc. is granted summary judgment with respect to plaintiffs' Second, Third, Fourth and Fifth Claims for Relief.

2. Defendant North Bend Fabrication & Machine, Inc. is granted partial summary judgment with respect to subparagraphs: a, b, c, and e, of Paragraph X of plaintiffs' First Claim for Relief.

3. Defendant North Bend Fabrication & Machine, Inc.'s Motion for Summary Judgment is denied with respect to subparagraph d of Paragraph X of plaintiffs' First Claim for Relief.

4. Defendants' John Dudrey, et al., Motions to Dismiss/Strike are granted with respect to plaintiffs' Second, Third, Fourth, and Fifth Claims for Relief.

5. Defendants' John Dudrey, et al., Motions to Strike are granted with respect to subparagraphs: a, b, c and e, of Paragraph X of plaintiffs' First Claim for Relief.

6. Defendants' John Dudrey, et al., Motions to Strike are denied with respect to subparagraph d of Paragraph X of plaintiffs' First Claim for Relief.

IT IS FURTHER ORDERED that plaintiffs shall have twenty (20) days in which to further plead, and that subparagraph X (d) shall be segregated into a separate claim for relief, but that plaintiffs shall not have leave to replead any facts or issues relating to the constitutionality of ORS Chapter 783 or the constitutionality or propriety of the seizure instituted under Chapter 783, with the exception of the jurisdictional question raised under Paragraph X (d) of plaintiffs' First Claim for Relief.

DATED this 14th day of June, 1982.

/s/Richard L. Barron, JUDGE

APPENDIX D

Judgment of Coos County Circuit Court Judge Richard L. Barron sitting by designation in Multnomah County Circuit Court, dated June 14, 1982

No. A8110-06552

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ROCKY B. FISHERIES, INC., an Oregon corporation; JOHNNY O. BROWN and DAVID BROWN,

Plaintiffs,

vs.

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation; JOHN DUDREY with his law firm partners, FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN,

Defendants.

JUDGMENT

Defendants North Bend Fabrication & Machine, Inc.'s Motion for Summary Judgment, defendants' John Dudrey, et al., Motions to Dismiss and Strike were granted with respect to plaintiffs' Second, Third, Fourth, and Fifth Claims for Relief, and with respect to subparagaphs a, b, c, and e of Paragraph X of Plaintiffs' First Claim for Relief pursuant to court order of June 14, 1982. A copy of the order granting defendants' motions is attached hereto as Appendix "A".

This court has expressly determined that because of the complexity of the case with respect to the multiple claims against the multiple defendants, final judgment on the essential legal issues decided by this court should be rendered forthwith in order to expedite the proceedings now before this court and minimize the prejudice to all the parties.

Pursuant to court order and by stipulation of all the parties, plaintiff filed an amended complaint which is identical to plaintiffs' complaint except that the allegation previously contained in subparagraph X (d) of the First Claim for Relief in plaintiffs' complaint was segregated into a separate claim, plaintiffs' sixth claim in plaintiffs' Amended Complaint would be subject to its previous order, and plaintiffs having consented thereto; now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to ORCP 67B and in the interests of judicial efficiency and in order to minimize the prejudice to all the parties, as well as to expedite and simplify the proceedings and to avoid the multiplicity of lawsuits, this court expressly determines that there is no just reason for delay, and that judgment is hereby rendered against plaintiffs and

in favor of all defendants as to plaintiffs' First, Second, Third, Fourth and Fifth Claims for Relief in plaintiffs Amended Complaint.

DATED this 14 day of June, 1982.

/s/Richard L. Barron, JUDGE

APPENDIX E

Notice of Appeal

No. A 25230

IN THE COURT OF APPEALS FOR THE STATE OF OREGON

ROCKY B. FISHERIES, INC., an Oregon corporation, JOHNNIE BROWN and DAVID BROWN,

Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation; JOHN DUDREY with his law firm partners FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN,

Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rocky B. Fisheries, Inc., an Oregon corporation, Johnnie Brown and David Brown, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State or Oregon, affirming the granting of the individual defendants' motion to dismiss and affirming the granting of North Bend's motion for summary judgment, entered in this action on January 25, 1984. The Oregon Court of Appeals was the highest court in which a decision could be had by virtue of the Oregon Supreme Court's denial of appellants' petition for review on April 24, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 20th day of June, 1984.

Respectfully submitted,

MARTIN, BISCHOFF, TEMPLETON,
BIGGS & ERICSSON

/s/ John L. Langslet
Attorneys for Appellants

(Certificate of Service)

APPENDIX F

Statutes Involved

Or. Rev. Stat. 783.010 to 783.170

783.010 Claims for which liens accorded. Every boat or vessel used in navigating the water of this state or constructed in this state is liable and subject to a lien:

(1) For wages due to persons employed, for work done or services rendered on board such boat or vessel.

(2) For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owner, or with any person having them employed to construct, repair or launch such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen or others in the building, repairing, fitting and furnishing or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of premiums for insurance placed on or with respect to such boat or vessel, or on account of launchways constructed for the launching of such boat or vessel.

(3) For all sums for wharfage, anchorage or towage of such boat or vessel within this state.

(4) For all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of the boat or vessel on which such contract is to be performed, and for damages or injuries done to persons or property, by such boat or vessel, and for damages or injuries by such boat or vessel resulting in the death of any person.

783.020 Lien Priority. (1) The classes of claims specified in ORS 783.010 shall have priority according to the order in which they are enumerated.

(2) The liens under ORS 783.010 shall have precedence over all other liens and claims against such boat or vessel, except the following liens, claims and security interests, whether or not the following liens, claims or security interests have arisen or been perfected before or after liens under ORS 783.010:

(a) Liens and claims arising under those portions of the Ship Mortgage Act, 1920, that appear in sections 921 to 954 and 971 to 975 of title 46 of the United States Code.

(b) Security interests perfected under ORS chapter 79.

(c) Security interests on certificates of title perfected under ORS chapter 488.

783.030 Right to proceed against boat or vessel directly. Any person having a demand as mentioned in ORS

783.010, instead of proceeding for recovery thereof against the master, owner, agent or consignee of the boat or vessel, may at his option commence an action against such boat or vessel by name.

783.040 Complaint; jurisdiction and venue. Any person wishing to commence an action against a boat or vessel shall file his complaint against such boat or vessel by name with the clerk of the circuit court of the county in which the boat or vessel may lie or be. The complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued, and shall be verified by the plaintiff or some credible person for him.

783.050 Issuance of warrant for seizure of boat or vessel. Whenever the complaint is filed, the clerk shall issue a warrant thereon, commanding the sheriff to seize the boat or vessel mentioned in the complaint, with her tackle, apparel, and furniture and retain the same until discharged from such custody by due course of law.

783.060 Procedure after return of warrant. Upon the return of any warrant issued as prescribed in ORS 783.050, proceeding shall be had in the circuit court against the boat or vessel seized, in the same manner as if the action had been commenced against the person on whose account the demand accrued.

783.070 Persons authorized to appear for boat or vessel; answer. The master, owner, agent or consignee of the boat or vessel may appear on behalf of the boat or vessel and answer the complaint.

783.080 Judgment by default; proceedings on issue of fact. If in any action commenced under ORS 783.030 and 783.040 the master, owner, agent or consignee does not appear and answer the complaint, the plaintiff may proceed to take judgment in the same manner and under the same restrictions as in a civil action against a natural person. If an issue of fact is joined, the same proceeding shall be had as in other actions.

783.090 Discharge of boat or vessel on giving of undertaking. If the master, owner, agent or consignee, before final judgment in any action commenced in pursuance of ORS 783.030 and 783.040, enters into an undertaking in favor of the plaintiff, with sufficient security, to be approved by the judge or clerk of the court in which the action is pending, conditioned to satisfy the amount which is adjudged due and owing to the plaintiff on determination of the action, together with all costs accruing, such boat or vessel, with its tackle, apparel and furniture, shall be discharged from further detention by the sheriff.

783.100 Retention of deposit; disposition of balance. If judgment is for the defendant, any deposit in lieu of an undertaking shall be returned to the person making the same; or if a balance remains after satisfying any judgment in favor of the plaintiff and costs of suit, the balance shall be so returned.

783.110 Order for sale on judgment. If judgment is rendered against any boat or vessel in favor of the

plaintiff, the court shall make an order directed to the sheriff, commanding him to sell the boat or vessel, together with its tackle, apparel and furniture, to satisfy the judgment and costs which may have accrued in the cause, which order shall be executed and returned in the same manner as other executions.

783.120 Judgment of undertaking; issuance of execution. If an undertaking with surety was given according to ORS 783.090 and judgment rendered in favor of the plaintiff, a judgment shall also be rendered upon the undertaking, and execution issued for the amount of judgment and costs in favor of the plaintiff, against the principal and security in such undertaking.

783.130 Bill of sale of boat or vessel; effect of previous liens. When any boat or vessel is sold in pursuance of ORS 783.110 to 783.160, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assigns, be free and discharged from all previous liens and claims under this title.

783.140 Rights of other lien claimants. Any other person having or claiming a lien against any boat or vessel in pursuance of ORS 783.010 may, at any time after the sale upon execution and before payment over of any surplus in the hands of the sheriff, commence an action against such boat by name, as if the same had not been sold, and serve notice thereof upon the former master, owner, agent or consignee. While such action is pending, the sheriff shall not pay over any surplus that may be in his

hands to such master, owner, agent or consignee.

783.150 Distribution of proceeds of sale. In the distribution of the proceeds of sale, claims of a prior class shall be paid entire before any payment shall be made upon claims of a subsequent class. When the money to be applied to any class is insufficient to pay all the claims of that class, it shall be apportioned ratably among the claims of that class.

783.160 Sale of appurtenances for fractional share of boat or vessel. If it appears to the court in which the action is pending, or the judge thereof, that the liens against the boat or vessel can be satisfied by a sale of the tackle, apparel and furniture, or a part thereof, or a fractional share in such boat or vessel, the court or judge may modify the order of sale accordingly. If in pursuance of such order a sale is made of a fractional share in such boat or vessel, the purchaser shall hold such share jointly with the other owners.

783.170 Limitation of actions. All actions against a boat or vessel under ORS 783.010 to 783.160 shall be commenced within one year after the cause of action has accrued.

Or. Rev. Stat. 29.020 to 29.075
(now Or. R. Civ. P. 81-85)

29.020 Definitions for ORS 29.020 to

29.075. As used in ORS 29.020 to 29.075, unless the context requires otherwise:

(1) "Consumer goods" means consumer goods as defined in ORS 79.1090.

(2) "Consumer transaction" means a transaction in which the defendant obligates himself to pay for goods sold or leased, services rendered or moneys loaned, primarily for purposes of the defendant's personal, family or household use.

(3) "Issuing officer" means any person who on behalf of the court is authorized to issue provisional process.

(4) "Property" means a present or future legal or equitable, vested or contingent, interest in money, documents, instruments, accounts, chattel paper, general intangibles, contract rights, choses in action, goods or other real or personal property.

(5) "Provisional process" means attachment under ORS 29.110 to 29.400, garnishment under such attachment, replevin or claim and delivery under ORS 29.810 to 29.910 or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, property in which the defendant claims an interest.

29.025 Requirements for issuance of provisional process. To obtain an order for issuance of provisional process the plaintiff shall file with the clerk

of the court from which such process is sought an affidavit or sworn petition requesting specific provisional process and showing, to the best knowledge, information and belief of the plaintiff:

(1) The name and residence or place of business of the defendant;

(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

(3) Description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

(5) A copy or verbatim recital of any writing or portion of a writing which evidences the origin or source of the plaintiff's claim to provisional process;

(6) Whether the claimed property is wrongfully detained by the defendant or another person;

(7) Whether the claimed property has been taken by public authority for a tax, assessment or fine;

(8) Whether the claimed property is held under execution, garnishment or other legal or equitable process or, if it is so held, either that the plaintiff has a superior right to provisional pro-

cess in the property or that the property is exempt from such execution, garnishment or process;

(9) If the plaintiff claims that the defendant has waived his right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

(10) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

(11) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state or transfer to an innocent purchaser;

(12) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

(13) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

(14) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

29.030 Provisional process prohibited in certain consumer transactions. (1) Except under ORS 29.040, no court

shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction.

(2) In absence of finding described in subsection (2) of ORS 29.035 the court shall not order issuance of provisional process.

(3) In absence of specific application by the plaintiff the court shall not order issuance of provisional process.

29.035 Evidence admissable; choice of remedies available to court. (1) The court shall consider the affidavit or petition filed under ORS 29.025 and may consider other evidence, including, but not limited to, an affidavit, deposition, exhibit or oral testimony.

(2) If from the affidavit or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, a restraining order or a show cause order. The finding under this subsection is subject to dissolution upon hearing.

29.040 Jurisdiction quasi in rem. Subject to ORS 29.030, where provisional process is sought to acquire quasi in rem jurisdiction of the defendant, if the court finds that the defendant neither resides in nor maintains an office or place of business in this state or that with use of reasonable diligence the defendant in the proceeding on the underlying claim cannot be served within

this state in a manner sufficient to effect in personam jurisdiction of the defendant, the court shall order issuance of provisional process.

29.045 Effect of notice of bulk transfer. Subject to ORS 29.030, if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

29.050 Effect of waiver of right to notice and hearing. Subject to ORS 29.030, if the court finds:

(1) That the defendant, by conspicuous words in a writing executed by or on behalf of the defendant before filing of the affidavit or petition under ORS 29.025 or by handwriting of the defendant or the defendant's agent executed before filing of the affidavit or petition under ORS 29.025 has declared substantially that he is aware of his right to notice and hearing on the question of the probable validity of the underlying claim before he can be deprived of his property in his possession or control or in the possession or control of another and that he waives that right and agrees that the creditor, or one acting on behalf of the creditor, may employ provisional process to take possession or control of the property without first obtaining a final judgment or giving notice and opportunity for hearing on the probable validity of the underlying claim,

(2) That there is no reason to believe that the waiver or agreement is invalid, and

(3) That the defendant has voluntarily, intelligently and knowingly waived that right,

the court shall order issuance of provisional process in property to which the waiver and agreement apply.

29.055 Issuance of provisional process where damage to property threatened. Subject to ORS 29.030, if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer or violation.

29.060 Restraining order to protect property. Subject to ORS 29.030, where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage or loss to the plaintiff is imminent, if an undertaking has been filed by

the plaintiff in accordance with ORS chapter 32, the court, in its discretion, may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing or otherwise disposing of property and requiring the defendant and each such other person to appear at a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim.

29.065 Appearance; hearing; service of show cause order; content; effect of service on person in possession of property. (1) Subject to ORS 29.030, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

(2) The show cause order issued under subsection (1) of this section shall be served personally on the defendant and on each other person to whom the order is directed.

(3) The order shall:

(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, the court may restrain the person so served from injuring, destroying, transferring, removing or concealing the property pending further order of the court.

29.070 Waiver; order without hearing. If after service of the order issued under subsection (1) of ORS 29.065 the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that he is aware that he has the right to be heard, that he does not want to be heard, that he expressly waives his right to be heard, that he understands that upon his signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to ORS 29.030, without hearing shall order issuance of provisional process.

29.075 Authority of court on sustaining validity of underlying claim. (1) Subject to ORS 29.030, if the court on hearing on a show cause order issued under ORS 29.065 finds that there is probable cause for sustaining the validity of the underlying claim, the court shall order issuance of provisional process.

(2) Subject to ORS 29.030, if the court on hearing on a show cause order issued under ORS 29.065 finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, the court in its discretion may continue or issue a restraining order.

Or. R. Civ. P. 83-84

PROVISIONAL PROCESS
RULE 83

A. **Requirements for issuance.** To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiant, that the action is one in which provisional process may issue, and:

A.(1) The name and residence or place of business of the defendant;

A.(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

A.(3)(a) If the provisional process sought is claim and delivery, a descrip-

tion of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

A.(3)(b) If the provisional process sought is a restraining order, a statement of the particular acts sought to be restrained;

A.(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

A.(5) A copy or verbatim recital of any writing or portion of a writing, if plaintiff relies upon a writing, which evidences the origin or source of the plaintiff's claim to provisional process;

A.(6) Whether the claimed property is wrongfully detained by the defendant or another person;

A.(7) Whether the claimed property has been taken by public authority for a tax, assessment, or fine;

A.(8) If the plaintiff claims that the defendant has waived the right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

A.(9) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

A.(10) Facts, if any, which tend to establish that there is a substantial

danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser.

A.(11) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

A.(12) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

A.(13) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

B. **Provisional process prohibited in certain consumer transactions.** No court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction. Provisional process authorized by Rule 85 may issue in consumer transactions.

C. **Evidence admissable; choice of remedies available to court.**

C.(1) The court shall consider the affidavit or petition filed under section A. of this rule and may consider other evidence including, but not limited to, an affidavit, deposition, exhibit, or oral testimony.

C.(2) If from the affidavit or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, as provided in Section D. or E. of this rule, or a restraining order, as provided in section F. of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

D. **Effect of notice of bulk transfer.** Subject to section B. of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

E. **Issuance of provisional process where damage to property threatened.** Subject to section B. of this rule, if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, and if Rule 82 A. has been complied with, the court shall order issuance of provisional process in property

which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation.

F. **Restraining order to protect property.** Subject to section B. of this rule, where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal, or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage, or loss to the plaintiff is imminent, and if Rule 82 A. has been complied with, the court in its discretion may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing, or otherwise disposing of property and requiring the defendant and each such other person to appear at a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim. Such order shall conform to the requirements of Rule 79 D. A restraining order under this section does not create a lien.

G. **Appearance; hearing; service of show cause order; content; effect of service on person in possession of property.**

G.(1) Subject to section B. of this rule, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for

hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

G.(2) The show cause order issued under subsection (1) of this section shall be served on the defendant and on each other person to whom the order is directed.

G.(3) The order shall:

G.(3)(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

G.(3)(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

G.(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, and if Rule 82 A. has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F. of this rule. Such order shall conform to the requirements of Rule 79 D. Any restraining order issued under this subsection does not create a lien.

H. **Waiver; order without hearing.**

If after service of the order issued under subsection G.(1) of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section B. of this rule without hearing shall order issuance of provisional process.

I. **Authority of court on sustaining validity of underlying claim; provisional process; restraining order.**

I.(1) Subject to section B. of this rule, if the court on hearing on a show cause order issued under section G. of this rule finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A. has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

I.(2) Subject to section B. of this rule, if the court on hearing on a show cause order issued under section G. of this rule finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, and if Rule 82 A. has been complied with, the court in its discretion may continue or issue a restraining order of

the nature described in section F. of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.

ATTACHMENT
RULE 84

A. **Actions in which attachment allowed.**

A.(1) **Order for provisional process.** Before a writ of attachment may be issued or any property attached by any means provided by this rule, the plaintiff must obtain an order under Rule 83 that provisional process may issue.

A.(2) **Actions in which attachment allowed.** The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, in the following cases:

A.(2)(a) An action upon a contract, expressed or implied, for the direct payment of money, when the contract is not secured by mortgage, lien, or pledge, or when it is so secured but such security has been rendered nugatory by act of the defendant.

A.(2)(b) An action against a defendant not residing in this state to recover a sum of money as damages for breach of any contract, expressed or implied, other than a contract of marriage.

A.(2)(c) An action against a defen-

dant not residing in this state to recover a sum of money as damages for injury to property in this state.

A.(3) **Exception for bank.** Notwithstanding subsection (2) of this section, no attachment shall be issued against any bank or its property before final judgment as security for the satisfaction of any judgment that may be recovered against such bank.

B. **Property that may be attached.** Only the following kinds of property are subject to lien or levy before final judgment:

B.(1) In actions in circuit court, real property;

B.(2) Tangible personal property, including negotiable instruments and securities as defined in ORS 78.1020 except a certificate of an account or obligation or interest therein of a savings and loan institution;

B.(3) Debts; and

B.(4) The interest of a distributee of a decedent's estate.

C. **Attachment by claim of lien.**

C.(1) **Property subject to claim of lien.** When attachment is authorized, the plaintiff may attach the defendant's real property by filing a claim of lien.

C.(2) **Form of claim; filing.**

C.(2)(a) **Form.** The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(2)(a)(i) Identify the action by

names of parties, court, docket number, and judgment demanded;

C.(2)(a)(ii) Describe the particular property attached in a manner sufficient to identify it;

C.(2)(a)(iii) Have a certified copy of the order authorizing the claim of lien attached to the claim of lien.

C.(2)(a)(iv) State that an attachment lien is claimed on the property.

C.(2)(b) **Filing.** A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located. The county clerk shall certify upon every claim of lien so filed the time when it was received. Upon receiving the claim of lien, the county clerk shall immediately file such claim of lien in the county clerk's office, and record it in a book to be kept for that purpose. When the claim of lien is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the claim of lien. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the claim of lien is recorded a minute of the discharge.

D. **Writ of attachment.**

D.(1) **Issuance; contents; to whom directed; issuance of several writs.** If directed by an order authorizing provisional process under Rule 83, the clerk shall issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the

defendant may be, and shall require the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) **Manner of executing writ.** The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) **Personal property not in possession of third party.** Tangible personal property not in the possession of a third person shall be attached by taking it into the sheriff's custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plaintiff's lien shall attach when the property is taken into the sheriff's custody.

D.(2)(b) **Other personal property.** Tangible and intangible personal property in the possession, control or custody of or debts or other monetary obligations owing by a third person shall be attached as provided in ORS 29.125 to 29.375.

D.(3) **Return of writ; inventory.** When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with the sheriff's proceedings indorsed thereon, to the clerk of the court where the action was commenced, and the sheriff shall make a full inventory of the property attached and return the same with the writ.

D.(4) **Indemnity to sheriff.** Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

E. **Disposition of attached property after judgment.**

E.(1) **Judgment for plaintiff.** If judgment is recovered by the plaintiff against the defendant, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment, the court shall order the property to be sold to satisfy the plain-

tiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by the sheriff or the proceeds thereof, upon the execution, and if any such property or proceeds remain after satisfying such execution, the sheriff shall, upon demand, deliver the same to the defendant; or if the property attached has been released from attachment by reason of giving of the undertaking by the defendant, as provided by section F. of this rule, the court shall upon giving judgment against the defendant also give judgment in like manner and with like effect against the surety in such undertaking.

E.(2) **Judgment not for plaintiff.** If judgment is not recovered by the plaintiff, all the property attached, or the proceeds thereof, or the undertaking therefor, shall be returned to the defendant upon service upon the sheriff of a certified copy of the order discharging the attachment.

F. **Redelivery of attached property.**

F.(1) **Order and bond.** If an attachment deprives the defendant or any other person claiming the property of the possession or use of the property, the defendant or such person may obtain redelivery or possession thereof upon a court order authorizing such redelivery or possession. The moving party shall file a surety bond undertaking, in an amount fixed by the court, to pay the value of the property or the amount of plaintiff's claim, whichever is less, if the same is not returned to the sheriff upon entry of judgment against the defendant. A motion seeking an order author-

izing such redelivery or possession must state the moving party's claim of the value of the attached property and must be served upon plaintiff as provided in Rule 9 at least five days prior to any hearing on such motion, unless the court orders otherwise. The property shall be released to the defendant upon the filing of the bond.

F.(2) **Defense of surety.** In an action brought upon such undertaking against the principal or the sureties, it shall be a defense that the property for which the undertaking was given did not, at the execution of the writ of attachment, belong to the defendant against whom the writ was issued.

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FILED
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ALEXANDER L. STEVAS
CLERK

(3)

No. 84-158

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROCKY B FISHERIES, INC., JOHNNY BROWN and DAVID BROWN, Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC., JOHN DUDREY with his law firm partners FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN, Appellees.

ON APPEAL FROM THE

OREGON COURT OF APPEALS

APPELLEES' MOTION TO DISMISS OR AFFIRM

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66 pp

LIST OF PARTIES

The caption contains the list of all parties to the proceedings. Appellee North Bend Fabrication & Machine, Inc. has no parent company, subsidiaries or affiliates.

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No. 84-158

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROCKY B FISHERIES, INC., JOHNNY BROWN and DAVID BROWN, Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC., JOHN DUDREY with his law firm partners FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN, Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

APPELLEES' MOTION
TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, Rules of the Supreme Court of the United States, appellees move the court for an order dismissing the appeal herein or affirming the judgment of the Oregon Court of Appeals on the grounds that the case raises no substantial federal question requiring further argument.

QUESTION PRESENTED

Neither the decision below nor the record raises the question which appellants present in their Jurisdictional Statement. Appellants ask, rhetorically, whether an Oregon statute which permits summary, ex parte, prejudgment seizure of a vessel "without any (a) pre-seizure notice; (b) pre-seizure hearing; (c) extraordinary situations existing; (d) a writ being issued by a judge; (e) sworn affidavits of the claimant; (f) post-seizure hearings; or (g) adequate bond being posted" violates rights secured by the Fourteenth Amendment to the United States Constitution. (Jurisdictional Statement, p. i.) The Oregon Court of Appeals did not decide that question, however. Moreover, the record will not support a determination of that question by this Court.

Appellants contended in the trial court that appellees are liable under

42 U.S.C. §1983.[1] Like the trial court, the Oregon Court of Appeals held that appellants could not state a §1983 claim because the procedural safeguards observed in the seizure of the Rocky B satisfied the requirements of due process.

The following safeguards were observed: (1) a judge authorized the seizure after reviewing specific allegations setting forth the basis of North Bend's claim of lien under Oregon's vessel lien law; (2) the seizure gave the appellants immediate and actual notice of the need to defend their interests in the vessel; (3) the appellants had an opportunity for a prompt post-seizure

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[1]Appellants also contended that appellees are liable under various common law theories. Since appellants' common law contentions raise questions of state law only, they are not involved in this appeal. This appeal is limited to issues raised by the judgment of the Oregon Court of Appeals' affirming the trial court's dismissal of appellants' §1983 claim.

hearing to challenge the validity of the underlying claim and of the seizure but did not avail themselves of it; and (4) the appellants could have obtained discharge of the vessel by posting adequate security with the court, but they did not do so.

The only question presented by this appeal is whether a seizure accomplished with these safeguards deprived appellants of property without due process.[2] This question is readily answered on the basis of previous decisions of this Court. Therefore, the case does not involve a substantial federal question which requires further argument.

---

[2]North Bend acted under color of state law by bringing an action in which a state official, the sheriff, seized the vessel. *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed.2d 482 (1982).

ARGUMENT

1. Factual Statement.[3]

The appellants Brown contracted with Charleston Marine Works, Inc. to build a fishing vessel, the Rocky B, in May, 1979. Construction was financed by the Southern Oregon Production Credit Association (PCA), which secured its loan with what appellants characterize as a "preferred ship's mortgage." The Rocky B was launched, documented and licensed in November, 1979. A month later, the Browns transferred their interest in the vessel to appellant Rocky B Fisheries, Inc., a corporation in which the Browns were shareholders and directors and which employed them.

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[3]This statement of facts is drawn from the pleadings in the underlying action against the vessel, reproduced as Appendices A, B and C hereto; the complaint in this action, reproduced as Appendix D hereto; and the opinion of the Oregon Court of Appeals, *Rocky B Fisheries v. No. Bend Fab.*, 66 Or. App. 625, 627-28, 676 P.2d 319, *rev. denied* 297 Or. 82 (1984), appended to the Jurisdictional Statement, A-3 to A-5.

Appellee North Bend supplied services, equipment and materials on an open account for the construction, outfitting and equipping of the vessel at the request of the contractor and Johnny Brown. Some of these were supplied before the vessel was launched and licensed, and some afterward. An outstanding balance of $5,410.04 was due when North Bend claimed a non-maritime lien on the vessel in that amount pursuant to Or. Rev. Stat. 783.010.

On August 1, 1980, North Bend filed an action against the Rocky B by name in the circuit court of the county where it was located. (Complaint, App-1 to App-5.) The complaint sought judgment against the vessel for the amount due. North Bend moved for an order directing the clerk of the court to issue a warrant for the seizure of the vessel. In an ex parte proceeding, a circuit court judge reviewed the facts set forth in the complaint,

required North Bend to post a bond to indemnify the sheriff against wrongful seizure, and ordered the clerk to issue a warrant and the county sheriff to seize the vessel pursuant thereto. (Order for Warrant for Seizure of Boat or Vessel, App-6 to App-7.)

The sheriff executed the warrant and seized the vessel. Neither the complaint, the order nor the warrant was served on the appellants before the seizure. Nonetheless, the appellants learned of the seizure immediately and demanded release of the vessel. The sheriff did not release it. None of the appellants sought an order discharging the vessel from the court's custody or otherwise made an appearance in the pending vessel lien action.

PCA commenced an action in the United States District Court of the State of Oregon to foreclose its mortgage. The marshall, acting pursuant to an order of

that court, seized the vessel from the sheriff and was holding it under arrest when appellants commenced this action against North Bend and its attorneys for damages resulting from the seizure of the vessel.

In this action, appellants claim that appellees are liable under 42 U.S.C. §1983 on the grounds that the seizure deprived them of property without due process of law. The trial court granted North Bend's motion for summary judgment and the individual appellees' motion to dismiss. The Oregon Court of Appeals affirmed, and the Supreme Court of Oregon did not grant review.

2. Oregon's Vessel Lien Law.

Or. Rev. Stat. 783.010 makes a vessel constructed in this state liable for debts incurred in furnishing materials and labor for its construction, outfitting and equipping. It subjects the vessel to a

lien for such debts. Or. Rev. Stat. 783.010(2).[4]

The lien is enforceable by an action in rem which the creditor may bring against the vessel by name. Or. Rev. Stat. 783.030. The action is commenced by filing a complaint in the circuit court of the county where the vessel is located. Or. Rev. Stat. 783.040. The complaint must set forth the creditor's demand in all its particulars and on whose account the demand

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[4]Or. Rev. Stat. 783.010(2) provides, in pertinent part:

> "Every boat or vessel . . . constructed in this state is liable and subject to a lien:
>
> ". . . (2) For all debts due to persons by virtue of contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owners, . . . to construct . . . such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen or others in the building, . . . fitting and . . . equipping such boat or vessel . . . ."

accrued, and it must be verified by the plaintiff or some credible person for him. Or. Rev. Stat. 783.040.

Or. Rev. Stat. 783.050 provides that the clerk of the court *shall* issue a warrant commanding the sheriff to seize the vessel. Once the warrant is returned, the action may proceed in the circuit court against the vessel in the same manner as if the action had been commenced against the debtor. Or. Rev. Stat. 783.060.

The owner, master, agent or consignee of the vessel may appear on its behalf and answer the complaint. Or. Rev. Stat. 783.070. If no appearance is made, however, the plaintiff may obtain a default judgment against the vessel. Or. Rev. Stat. 783.080.

The owner, master, agent or consignee may have the vessel released before the underlying claim is adjudicated by filing an undertaking in favor of the creditor

with security in an amount to be approved by the judge or clerk of the court. Or. Rev. Stat. 783.090. If such an undertaking is filed, a judgment against the vessel will be entered against the undertaking. Or. Rev. Stat. 783.120. If one is not filed, the vessel will be sold to satisfy a judgment against it. Or. Rev. Stat. 783.110.

The Oregon Court of Appeals has construed Or. Rev. Stat. 783.090 to provide an opportunity to the owner for an early post-seizure hearing ". . . to challenge the legality of the seizure, the validity of the claim, or the amount claimed . . . ." *Rocky B Fisheries v. No. Bend Fab., supra*, 66 Or. App. at 633-34,

Appendix to the Jurisdictional Statement, A-22 to A-23.[5]

At such a hearing, the owner may move to dismiss the action for lack of subject matter jurisdiction and lack of jurisdiction over the vessel pursuant to Or. R. Civ. P. 21A upon the grounds that the seizure is invalid. If the pleadings do not apprise the court of the relevant facts, the moving party may ask the court to require the creditor to show cause why the court has jurisdiction. Or. R. Civ. P. 21A. It is incumbent upon the creditor to sustain the court's jurisdiction in the face of such a challenge. Therefore, Oregon's vessel lien law in conjunction with its rules of procedure gives the owner

---

[5]This Court is bound by the state court's construction of a state statute. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688, 79 S. Ct. 1362, 1365, 3 L. Ed. 2d 1512 (1959); *Guaranty Trust v. Blodgett*, 287 U.S. 509, 513, 53 S. Ct. 244, 245, 77 L. Ed. 463 (1933). Therefore, in determining the constitutionality of a state statute, the Court must test it as construed by the state appellate court.

of the seized vessel an opportunity for a prompt post-seizure hearing on the merits of the underlying claim and the validity of the seizure.

3. Appellants Were Accorded the Procedural Safeguards Due Them Under the 14th Amendment.

Seizure of the vessel was accomplished with constitutionally adequate procedural safeguards. Appellants contended before the trial court that they were denied due process because the seizure was authorized even though North Bend did not submit an affidavit of probable cause or an adequate bond to protect appellants' interest in the vessel; appellants did not receive preseizure notice or were not given an opportunity to present affidavits of evidence to the court; and no facts were presented to the court that the Rocky B was in danger of destruction, harm, concealment or transfer. (Complaint, ¶ XIV, App.-16 to

App.-17.) This Court has never held that each of the preceding safeguards is required in every case of prejudgment seizure of property, and the law is to the contrary.

Procedural due process is not meant to protect persons from deprivation of life, liberty or property but from their *mistaken* or *unjustified* deprivation. *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972). Thus, in deciding what procedural safeguards are required by the Constitution in various contexts, the Court has repeatedly emphasized that the rules of procedural due process are shaped by the risk of error inherent in the truth-finding process. Such rules are meant to minimize substantively unfair or mistaken deprivations of life, liberty or property by enabling persons to contest the basis upon which a state proposes to deprive them of protected

interests. *Carey v. Piphus*, 435 U.S. 247, 259-60, 98 S. Ct. 1042, 1050, 55 L. Ed. 2d 252 (1978).

Furthermore, the due process clause does not embody any single model of procedural fairness or require a particular form of procedure that must be followed before a state may interfere with a protected interest.

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' *Inland Empire Council v. Millis*, 325 U.S. 697, 710, 65 S. Ct. 1316, 1323, 89 L. Ed. 1877 (1945). Due process of law guarantees 'no particular form of procedure; it protects substantial rights.' *NLRB v. Mackay Co.*, 304 U.S. 333, 351, 58 S. Ct. 904, 913, 82 L. Ed. 1381 (1938). 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961); *Stanley v. Illinois*, 405 U.S. 645, 650, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972)." *Mitchell v. W. T. Grant Company*, 416 U.S. 600, 610, 94 S. Ct.

1895, 1901, 40 L. Ed. 2d 406 (1974) (White, J.).

Justice Frankfurter wrote in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63, 71 S. Ct. 624, 643-64, 95 L. Ed. 817 (1951) (concurring):

> "'Due process' is compounded of history, reason [and] the past course of decisions . . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment and escapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
> . . . .
>
> "The Court has responded to the infinite variety of perplexity and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another."

Recent decisions of the Court demonstrate these principles. In *Sniadach v. Family Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113

(1971), *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975), an established state procedure authorized the deprivation of property, and the Court held that due process required predeprivation notice and hearing in order to minimize the possibility that a wrongful deprivation would occur.

The Court has recognized, however, that post-deprivation remedies, if available under state law, can satisfy the due process clause. Referring to several of the Court's earlier decisions, Justice Rehnquist, in *Parratt v. Taylor*, 451 U.S. 527, 538-39, 101 S. Ct. 1908, 1914-15, 68 L. Ed. 2d. 420 (1981), wrote:

> ". . . . In such cases, the normal predeprivation notice and opportunity to be heard is pre-termitted if the State provides a postdeprivation remedy . . . . These cases recognize that either

the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." [Citations and footnotes omitted.]

In *Mitchell*, the Court had stated:

"Petitioner asserts that his right to a hearing before his possession is in any way disturbed is nonetheless mandated by a long line of cases in this Court, culminating in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), and *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). The pre-*Sniadach* cases are said by petitioner to hold that 'the opportunity to be heard must precede any actual deprivation of private property.' Their import, however, is not so clear as petitioner would have it: they merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial

> enquiry is not denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' *Phillips v. Commissioner*, 283 U.S. 589, 596-597, 51 S. Ct. 608, 611, 75 L. Ed. 1289 (1931)." 416 U.S. at 611, 94 S. Ct. at 1902. [Footnote omitted.]

After quoting the foregoing passage,

Justice Rehnquist continued:

> "Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). However, . . . we have rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available." *Parratt v. Taylor, supra*, 451 U.S. at 540-41, 101 S. Ct. at 1915-16 [Footnote omitted.]

Thus, due process does not require a preseizure hearing where an adequate and timely post-seizure hearing is available under state law.

Nor is preseizure notice always required. The right to notice is inseparable from the right to a hearing. As Justice Jackson observed, the right to be heard

> ". . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 965 (1950).

The timing and the form of notice may vary from case to case, however.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such a nature as reasonably to convey the

> required information . . . and it must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied . . . .
>
> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, when conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Id.* at 314-15, 70 S. Ct. at 657-58.

Thus, notice which is reasonably certain to inform those affected that their interests in the property are at risk and which is given early enough to permit them to defend their interests is constitutionally adequate if the practicalities and

peculiarities of the case prohibit preseizure notice.

The question remains, however, whether notice and a hearing are required by the due process clause before a vessel may be seized under Oregon's vessel lien law and, if not, whether the post-seizure hearing permitted by Oregon law is constitutionally adequate. To answer this question, the Court must not only examine the procedural safeguards with which this particular seizure was accomplished, but also recall that Oregon law gives a creditor such as North Bend an interest in the newly constructed vessel.

A vessel constructed in Oregon is subject to a lien in favor of one who supplies materials and services in its construction, outfitting and equipping. Or. Rev. Stat. 783.020(2). The vessel itself is viewed as the obligor, whether or not the owner is also obligated. The

creditor's rights are limited to the value of the vessel and depend upon its presence within the state. Under Oregon law, the lien is a property interest in the vessel, and seizure is the means by which it is perfected. *Paddack v. Rasmussen*, 294 Or. 599, 602, 660 P.2d 677 (1983). Therefore, Oregon law gives a creditor who has supplied services and materials in the construction, equipping and outfitting of a vessel an interest in it sufficient to permit the vessel to be detained and ultimately subjected to sale for satisfaction of the debt.

The creditor's interest vanishes with the vessel, however. Unless the vessel is seized and brought within the court's custody, the creditor acquires no lien. *Paddack v. Rasmussen, supra*.

In *Paddack*, the trustees of a union trust fund informed the vessel owners'

attorney that they claimed a lien on the vessel for contributions due the fund for labor expended by union members in the vessel's construction. Plaintiffs then filed suit against the vessel and its owners to foreclose a vessel construction lien under Or. Rev. Stat. 783.010. Before the owners were served or the vessel seized, the owners had the vessel towed to a Washington shipyard for completion of construction. The action against the vessel was subsequently dismissed for lack of jurisdiction. Plaintiffs then brought a second action against the owners to recover damages for wrongful removal of the vessel. The Supreme Court of Oregon affirmed dismissal of the wrongful removal action on the ground that, since the vessel had not been seized, plaintiffs had never acquired a lien or any other interest in it that would support a claim for wrongful removal. 294 Or. at 604-605.

Because the action against the vessel is a proceeding in rem and the lien is not perfected unless the vessel is seized, seizure is necessary to give the state court jurisdiction of the defendant and power to proceed with the lien enforcement action.

> "'"The proceeding, therefore, is strictly and technically *in rem*; it is pursued without reference to the owner, to enforce a liability which the thing itself has incurred, and the thing is condemned to make reparation. ***Possession is the essential element upon which the jurisdiction of the court depends***; and as this possession is deemed that of the sovereignty under whose authority the court sits, if any question can be regarded as settled by the unanimous opinion of courts and jurists it is this, that the 'law regards the seizure of the thing as constructive notice to the whole world'" . . .'." *Paddack v. Rasmussen, supra*, 294 Or. at 604 [citing *Cordrey v. Steamship "Bee"*, 102 Or. 636, 651, 201 P. 202, 20 A.L.R. 1079 (1922), and quoting from *Keating v. Spink*, 3 Ohio St. 105, 62 A.D. 214 (1853)]. [Emphasis added.]

Therefore, swift and sure process must be available to secure the vessel to protect the creditor's interest and to enable the state court to acquire jurisdiction over the defendant and the action.

These facts are sufficient to distinguish seizure of a vessel under Oregon's vessel lien law from prejudgment attachment of a debtor's property in a creditor's action against the debtor who owns the attached property, as in *Sniadach* and *Fuentes*. The lien created by Oregon law gives the creditor an interest in the vessel which is perfected only by seizure. Prejudgment attachment does not create an interest in the attached property, but only secures it for eventual satisfaction of any judgment entered in favor of the attaching party. Furthermore, arrest of the vessel is necessary under Oregon law to give the court jurisdiction over the vessel and power to enter a judgment against it. By

contrast, prejudgment attachment presupposes that the court has personal jurisdiction of the owner of the attached property. As the Court of Appeals correctly observed, these differences do not immunize the procedure for arresting a vessel from the constraints of due process. They do, however, shape the analysis of what process is due.

Oregon's vessel lien law provides the following procedural safeguards:

(a) Before a vessel may be seized, the creditor must file a complaint that sets forth his demands in all its particulars, identifies the person on whose account the demand accrued, and is verified by the plaintiff or some credible person. Or. Rev. Stat. 783.040.

In the present case, the complaint set forth the details of North Bend's claim against the Rocky B. (App-1 to App-5.) It

alleged particulars about the ownership and construction of the Rocky B, that North Bend performed labor and furnished material for its construction, outfitting and equipping at the request of the boat builder and agents of the owner, that it received partial payment for its services, and that an unpaid balance remained due. In light of these details, appellants' assertion that the complaint contained only conclusory allegations is inaccurate.

The complaint was signed by North Bend's attorney, but not verified. Under Oregon law, the signature of an attorney on a pleading constitutes certification that the allegations are true to the best information, belief and knowledge of the attorney. Or. R. Civ. P. 17A. Judicial authorization of the seizure on the basis of certified allegations in the complaint was sufficient to overcome the lack of

verification, however. Its absence did not deprive appellants of due process.

(b) Although Oregon law requires the clerk of the court to issue an order to arrest the named vessel when a complaint is filed against it, Or. Rev. Stat. 783.050, in this case North Bend and its attorneys obtained judicial authorization of the seizure. Therefore, the exercise of the state's seizure power was subject to judicial control from the outset. Judicial participation in state-authorized seizures of property was a major factor leading the court to sustain Louisiana's sequestration statute. *Mitchell v. W. T. Grant Company, supra*, 416 U.S. at 615, 94 S. Ct. at 1904.

(c) The owner of the vessel was not given notice prior to its seizure. However, measured by the principles set forth in *Mullane v. Central Hanover Bank & Trust Co., supra*, preseizure notice is not required because seizure itself provides

constitutionally adequate notice in light of the interests served by the statute and the practical realities of the situation.

As *Paddack v. Rasmussen, supra,* illustrates so well, preseizure notice enables the owner to frustrate judicial enforcement of the lien by simply putting the vessel out to sea. The situation is thus substantially similar to the one that was before the Court in *Mitchell,* where it stated:

> ". . . There is the real risk that the buyer, with possession and power over the goods, will conceal or transfer the merchandise to the damage of the seller. This is one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property. An important factor in this connection is that *under Louisiana law, the vendor's lien expires if the buyer transfers possession.* It follows that if the vendor is to retain his lien, superior to the rights of other creditors, it is imperative when default occurs that the property be sequestered in order to foreclose the possibility that the buyer will sell or otherwise convey the

> property to those parties against whom the vendor's lien will not survive. *The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith.*" 416 U.S. at 609, 94 S. Ct. 1900-1901. [Emphasis added.]

That seizure is reasonably calculated to put the owner or master of the vessel on notice that the owner's interest is at risk is readily demonstrated by the facts of this case. Appellants concede that *immediately* after the seizure, they requested release of the vessel. (Complaint, ¶ VIII, App-14.) It cannot be doubted, therefore, that the seizure gave appellants reasonable, and hence constitutionally

adequate, notice, calling upon them to defend.[6]

The seizure of the Rocky B served the ends sought by state law. It provided immediate and actual notice to the owner of

---

[6]In *The Mary*, 9 Cranch, 126, 144, 3 L. Ed. 678 (1815), Chief Justice Marshall said:

> "It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself. *This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary*, and because it is the part of common prudence for all those who have any interest to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to The Mary, has constructive notice of her seizure and may fairly be considered as a party to the libel." [Emphasis added.]

the need to defend its interests in the Rocky B, it safeguarded the interests of the creditor, and it conferred jurisdiction upon the court. Preseizure notice serves only the first of these ends and can readily frustrate the others. Therefore, it is no more required here than it was in *Mitchell*.

(d) Oregon's vessel lien law permits the owner to obtain discharge of the vessel by posting sufficient security with the court. As construed by the Oregon Court of Appeals, it also provides the owner with a prompt post-seizure hearing to challenge the legality of the seizure and the validity and the amount of the claim. The owner can thus cut to a minimum the time of court-supervised possession and of loss of use of the vessel. Appellants here did not avail themselves of this opportunity, so their argument on the severity of the deprivation does not carry much weight.

Appellants complain that they could not have known of this opportunity until after the Court of Appeals had construed the statute in this case. (Jurisdictional Statement 25, n. 8.) This complaint ignores Or. Rev. Stat. 783.070. That statute expressly authorizes the master, owner, agent or consignee to appear in the action on behalf of the vessel. Under Oregon's rules of civil procedure, the person who appears on behalf of the vessel may challenge the court's jurisdiction of the defendant and its jurisdiction of the action before answering the complaint. Or. R. Civ. P. 21A. If the seizure is unconstitutional, it is invalid and the vessel must be released. That, of course, destroys the court's jurisdiction. Therefore, Or. Rev. Stat. 783.070, together with Oregon's rules of civil procedure, clearly afforded appellants an opportunity for a prompt post-seizure hearing had they chosen

to avail themselves of it. The opportunity existed under state law when the vessel was seized; it did not spring into existence with the Court of Appeals' construction of Or. Rev. Stat. 783.090, a different statutory provision.

Appellants suggest that the outcome of such a hearing would have been controlled by the fact that the materials and services for which the lien arose were provided after the vessel was launched, documented and licensed. (Jurisdictional Statement 25-26.) According to appellants, Oregon has no authority to seize a vessel for materials and supplies provided to an already constructed and seagoing vessel because such a lien is not a non-maritime lien, but a maritime lien subject to exclusive federal admiralty jurisdiction.

Appellants misunderstand the legal standards for determining where state jurisdiction of a non-maritime lien ends

and admiralty jurisdiction of a maritime lien begins. They mistakenly look upon the launching, documenting and licensing of the vessel as the events marking the line between the domains of state and federal jurisdiction. This focus obscures the fact that construction of a vessel includes all work necessary to put the vessel into the service for which it is intended, including any outfitting or equipping that may be needed after the vessel is launched and even documented. Constructing, launching, outfitting and documenting are all steps towards placing a vessel into service. State power does not automatically end and admiralty jurisdiction begin upon the completion of any one, or even all, of them.

The relevant question is whether the work for which the lien is claimed was necessary to bring the vessel into condition to function as intended. *Thames*

Towboat Co. v. The Francis McDonald, 254 U.S. 242, 245, 41 S. Ct. 65, 66, 65 L. Ed. 245 (1920); *Iroquois Transp. Co. v. De Laney F. & I. Co.*, 205 U.S. 354, 363-64, 27 S. Ct. 509, 512-13, 51 L. Ed. 836 (1906). Liens for labor and materials that are supplied in the construction, equipping and outfitting of a vessel and that are necessary to bring the vessel into condition to function as intended may be regulated by state law even after the vessel is launched and licensed, and they may be enforced by state courts even though a voyage is thereby interrupted and commerce hampered. *Iroquois Transp. Co. v. De Laney F. & I. Co., supra*.

In any event, North Bend moved for summary judgment as to the nature of its lien. The trial court denied that motion, finding that a material factual dispute required a trial. The nature of North Bend's lien remains to be resolved at

trial. Hence it is not an issue in this appeal.

CONCLUSION

The only question presented in this appeal is whether seizure of the Rocky B deprived the appellants of property without due process of law. The procedural safeguards provided by Oregon law, when examined in light of the interests protected and the objectives served by its vessel lien statute and when measured by the standards of *Mullane* and *Mitchell*, are a constitutional accommodation of the respective interests of vessel owners and creditors holding vessel construction liens. The seizure of the Rocky B observed those safeguards. Indeed, it even surpassed them in that the seizure was authorized by a judicial officer rather than the clerk of the court. It did not deprive appellants of property without due process of law. There is, therefore, no

substantial federal question presented by this case which requires further argument. The appeal should be dismissed or the judgment below summarily affirmed.

DATED this 20th day of August, 1984.

Respectfully submitted,

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

/s/ J.P. GRAFF

By: _____
J. P. Graff*
Of Attorneys for
Appellants

*Counsel of Record

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF COOS

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation, Plaintiff, vs. ROCKY B., a boat newly constructed in the State of Oregon, Defendant.	Case No. COMPLAINT

Plaintiff alleges:

I

At all material times mentioned herein, Plaintiff is now and has been an Oregon corporation.

II

The ROCKY B. is a newly constructed boat which was made and constructed in or near the City of Charleston, State of Oregon.

III

That at all material times mentioned herein, prior to the transfer of ownership to Rocky B. Fisheries, Inc., Johnny O. Brown and Dave Brown were the owners of said boat, ROCKY B. During the month of December, 1979, Johnny O. Brown and Dave Brown transferred ownership of said boat to Rocky B. Fisheries, Inc., an Oregon corporation, who at all times mentioned herein, subsequent to the date of said transfer of ownership from Johnny O. Brown and Dave Brown, has been and is now the owner of said boat, ROCKY B.

IV

That at all material times mentioned herein, Charleston Marine Works, Inc., an Oregon corporation, was a contractor employed by the above said owners of said boat during each of said owners' respective ownership of said boat for the building,

fitting, furnishing and equipping of said boat.

V

At all material times mentioned herein, Johnny O. Brown was the owner of said boat or an agent of Rocky B. Fisheries, Inc. during its ownership of said boat.

VI

That from December 13, 1979 to May 6, 1980, Plaintiff performed labor and furnished materials for the construction, fitting, furnishing and equipping of said boat, ROCKY B., at the special instance and request of Charleston Marine Works, Inc. or at the special instance and request of Johnny O. Brown.

VII

Plaintiff has not been paid for the reasonable value of said building

materials, supplies or other items provided for the building, fitting, furnishing and equipping of said boat, ROCKY B.

VIII

Said building materials, supplies and other items provided for the building, fitting, furnishing and equipping of the ROCKY B. are reasonably worth the sum of Five Thousand Four Hundred Ten and 04/100 Dollars ($5,410.04). After deducting all credits and offsets, there is now past due, owing and unpaid to Plaintiff the sum of Five Thousand Four Hundred Ten and 04/100 Dollars ($5,410.04) for the building fitting, furnishing and equipping of said boat, ROCKY B.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. In the sum of Five Thousand Four Hundred Ten and 04/100 Dollars ($5,410.04), together with interest thereon at the rate

of nine percent (9%) per annum from May 6, 1980 until paid.

2. For Plaintiff's costs and disbursements incurred herein.

3. For such other and further relief as to the Court may seem proper.

. . . .

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF COOS

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation, Plaintiff, vs. ROCKY B., a boat newly constructed in the State of Oregon, Defendant.	Case No. 80-1545 ORDER FOR WARRANT FOR SEIZURE OF BOAT OR VESSEL

THIS MATTER having come before the Court upon the motion of the above named Plaintiff and it appearing from the records of the Court that Plaintiff, pursuant to ORS Chapter 783, is entitled to a warrant for seizure of boat or vessel.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Upon the Plaintiff filing a bond in the sum of $10,000 indemnifying the Sheriff against wrongful seizure of said

boat, the Clerk of the Circuit Court of Coos County shall issue a warrant for seizure of boat or vessel pursuant to ORS 783.050 commanding the Sheriff to seize the boat, ROCKY B., Defendant in the above entitled action.

2. Upon issuance of said warrant for seizure of boat or vessel, the Sheriff of Coos County shall, pursuant to said warrant, seize the boat, ROCKY B., Defendant in the above entitled matter, with her tackle, apparel and furniture and retain the same until discharged from such custody by due course of law.

DATED this 5th day of August, 1980.

/s/ James A. Norman
CIRCUIT JUDGE

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF COOS

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation, Plaintiff, vs. ROCKY B., a boat newly constructed in the State of Oregon, Defendant.	Case No. 80-1545 WARRANT FOR SEIZURE OF BOAT OR VESSEL

TO: SHERIFF OF COOS COUNTY, GREETINGS:

WHEREAS, on the 1st day of August, 1980, Plaintiff in the above entitled action filed a duly verified complaint against the above named boat in the Circuit Court of the State of Oregon for the County of Coos, which complaint alleges amounts due to Plaintiff under an implied contract to perform labor and furnish materials in the construction, furnishing, fitting and

equipping of the above said boat, ROCKY B., and

WHEREAS, upon the filing of such complaint the Clerk of the Circuit Court pursuant to ORS 783.050 shall issue a warrant thereon commanding the sheriff to seize the boat or vessel named as Defendant in such complaint.

NOW, THEREFORE, IN THE NAME OF THE STATE OF OREGON, you are hereby commanded to seize the above said boat, ROCKY B., with her tackle, apparel and furniture, and retain the same until discharged from such custody by due course of law.

WITNESS my hand and seal of the above said Court on this 6th day of August, 1980.

CIRCUIT COURT CLERK OF
COOS COUNTY, OREGON

/s/ G Blair
Deputy

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

ROCKY B. FISHERIES, INC. an Oregon corporation; JOHNNY O. BROWN and DAVID BROWN, Plaintiffs,	No. A8110-06552
v.	COMPLAINT
NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation; JOHN DUDREY with his law firm partners, FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. MCCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN, Defendants.	ACTION AT LAW; DAMAGES; WRONGFUL SEIZURE OF PROPERTY; VIOLATION OF CIVIL RIGHTS; MALICIOUS ABUSE OF PROCESS; INTERFERENCE WITH CONTRACTUAL RELATIONS. DEMAND FOR TRIAL BY JURY

Plaintiffs allege:

FIRST CLAIM FOR RELIEF

(WRONGFUL SEIZURE)

I

At all times material hereto, plaintiff Rocky B. Fisheries, Inc. and defendant North Bend Fabrication and

Machine, Inc. were and are Oregon corporations in good standing.

II

Prior to January 10, 1980, plaintiffs Johnny Brown and David Brown had constructed and owned a fishing boat named "Rocky B." Said boat was launched January 10, 1980. During December, 1979, ownership of "Rocky B" was transferred by Johnny Brown and David Brown to plaintiff Rocky B. Fisheries, Inc., a corporation owned by Johnny and David Brown. "Rocky B" is a documented vessel pursuant to the laws of the United States, and was and is subject to a Preferred Ships Mortgage in favor of the Southern Oregon Production Credit Association, a corporation (hereinafter PCA).

III

During the construction of the "Rocky B", defendant North Bend

Fabrication and Machine, Inc. performed services and supplied materials for said boat, and incurred charges which were paid. After January, 1980, defendant North Bend Fabrication and Machine, Inc. performed additional services and supplied additional material for "Rocky B" and claimed charges in the sum of $5,410.04 as of May 6, 1980.

IV

At all times material hereto, the "Rocky B" had a fair market value of approximately $600,000.

V

At all times material hereto, plaintiffs Johnny Brown and David Brown were employees, officers and directors of plaintiff Rocky B Fisheries, Inc., whose principal asset was the "Rocky B" and their source of income and livlihood [sic] was earned and dependent on the "Rocky B" being used in the fishing industry.

VI

On August 5, 1980, defendants acquired, without notice of any kind to plaintiffs, an order for seizure of the "Rocky B" issued by the Circuit Court, State of Oregon, for the County of Coos. (Exhibit A attached hereto and incorporated by reference herein.) A warrant for seizure of the "Rocky B" was entered by the court clerk on August 6, 1980. (Exhibit B attached hereto and incorporated by reference herein). On or about August 6, 1980, the "Rocky B" was seized and arrested by the Sheriff of Coos County, Oregon.

VII

The seizure of the "Rocky B" was effected by defendant North Bend fabrication and Machine, Inc., acting through and in concert with its attorneys, defendant Lawrence F. Finneran of the law partnership consisting of defendants Jerry O. Lesan and Kirk Johansen, and

defendant John Dudrey of the law partnership consisting of defendants Floyd A. Fredrickson, Lloyd W. Weisensee, Peter C. McCord and Jay M. Fountain. Each of the said attorneys in these law partnerships are responsible for the acts of defendants Lawrence F. Finneran and John Dudrey as alleged herein, which acts were performed within the course and scope of their employment as attorneys for defendant North Bend Fabrication and Machine, Inc., and their employment by or partnership in the said law partnerships.

VIII

Immediately after the seizure of the "Rocky B", plaintiffs requested release of the "Rocky B" by defendants, which request was refused.

IX

Solely as a result of the seizure of the "Rocky B" by defendants, PCA was

forced to file a complaint for foreclosure of its mortgage on the "Rocky B" in the United States District Court for the District of Oregon (Civil No. 80-6300-c) in order to protect its interests. PCA caused the United States District Court to order seizure of the "Rocky B" by the United States Marshal, and the "Rocky B" remains at this time under seizure.

X

. . . .

XI

As a direct and proximate result of the wrongful acts of defendants, plaintiffs have been damaged in the sum of $1,000,000.

XII

The wrongful acts of defendants were wanton, grossly negligent, and reckless, and therefore punitive damages should be assessed against defendants in the sum of $1,000,000.

SECOND CLAIM

(VIOLATION OF CIVIL RIGHTS)

XIII

Plaintiffs reallege paragraphs I through IX, inclusive, and XI and XII of their FIRST CLAIM FOR RELIEF, as if fully set forth herein.

XIV

The seizure of the "Rocky B" was effected by the defendants, acting in concert under color of state law, in violation of plaintiffs' constitutional rights as guaranteed by the Constitution of the United States, and the Constitution and Laws of the State of Oregon, in that:

a. No notice was provided to plaintiffs.

b. No affidavit of probable cause was submitted to the Court;

c. No opportunity for a judicial hearing was afforded plaintiffs;

d. No adequate bond was posted to protect plaintiffs from wrongful seizure;

e. No opportunity was presented to plaintiffs to present affidavits of evidence to the court; and

f. No facts were presented to the court (and none existed) that the "Rocky B" was in danger of destruction, harm, concealment or transfer.

XV

Defendants alleged that the seizure was effected pursuant to Oregon statutes, ORS Chapter 783, which statutes were unconstitutional on their face, and were unconstitutional as applied to the seizure of the "Rocky B", as had already been clearly established by judicial decisions of the United States, the State of Oregon, and Oregon statutes.

XVI

Plaintiffs are entitled to recover their reasonable attorneys fees herein.

. . . .

WHEREFORE, plaintiffs pray for judgment against defendants and each of them:

. . . .

(2) On their Second Claim for damages in the sum of $1,000,000, punitive damages in the sum of $1,000,000, and for reasonable attorney fees incurred herein.

. . . .

Office - Supreme Court, U.S.
FILED
SEP 10 1984
ALEXANDER L. STEVAS
CLERK

No. 84-158

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

Rocky B. Fisheries, Inc., an Oregon corporation, Johnnie Brown and David Brown,

Appellants,

v.

North Bend Fabrication & Machine, Inc., an Oregon corporation; John Dudrey with his law firm partners Floyd A. Fredrickson, Lloyd W. Weisensee, Peter C. McCord and Jay M. Fountain; Lawrence F. Finneran with his law firm partners Jerry O. Lesan and Kirk Johansen,

Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

REPLY

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9/7/84

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List of Parties

The List of Parties appears at page (ii) of the Jurisdictional Statement.

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Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

REPLY

Reply to Appellees' Motion to Dismiss or Affirm

The questions presented by this appeal are substantial. This appeal

should not be dismissed. The decision of the Oregon Court of Appeals repudiates fundamental due process principles. The decision should not be affirmed.

ARGUMENT

> "At a minimum due process requires adequate notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 313-16, 70 S Ct 652, 94 L Ed 865 (1950). Rocky B. Fisheries v. No. Bend Fab., 66 Or 625, 632, 676 P2d 319, rev den 297 Or 82 (1984)." Hornbuckle v. Harris, 9 Or App 272, ___ P2d ____ (1984).

It is disturbing, as well as ironic, that the Oregon Court of Appeals has cited the instant case of Rocky B. Fisheries for the proposition that the United States Constitution requires adequate notice and an opportunity to be heard. Instead, this case stands for the proposition that due process rights can be denied in the state of Oregon. The decision of the Oregon Court of Appeals allows the summary, ex parte, prejudgment

seizure of a fishing boat, upon which the fisherman's livelihood is dependent, for non-admiralty, original construction liens, without any:

a. Pre-seizure notice;
b. Pre-seizure hearing;
c. Extraordinary situations existing;
d. A writ issued by a judge;
e. Sworn affidavits of the claimants;
f. Post seizure hearing; or
g. Adequate bond being posted.

I. Pre-Seizure Notice.

Appellees concede that appellants received no notice prior to the seizure of the fishing boat. "Neither the complaint, the order nor the warrant was served upon the appellants before the seizure." (Appellees' Motion to Dismiss or Affirm, p. 7). "The owner of the vessel was not given notice prior to its seizure." (Id., p. 29). However, appellees argue that pre-seizure notice is not necessary, because seizure itself

provides constitutionally adequate notice in an action in rem.

This principle was specifically rejected in Green v. Lindsey, 456 U.S. 444, 102 S. Ct. 1874, 1878-1879, ____ L. Ed. 2d ____ (1982):

> "'[A]ll proceedings, like all rights, are really against persons.' . . . [I]t will not suffice to recite that because an action is in rem, it is only necessary to serve notice upon the thing itself." 102 S. Ct. at 1878-1879.

As pointed out in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 94 L. Ed. 865 (1950), the categorization of an action as in rem, quasi in rem or in personam, does not modify the type of notice required. Whenever a person's property interest is adjudicated, notice must be given.

This court discussed in some detail in Mullane the type of notice that must be given. At a minimum, the notice must be "reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314, 70 S. Ct. at 657. In this case, the only notice was seizure. Appellants, who were very interested parties, were not apprised that they had any right to present any objections to a court of law.

II. Pre-Seizure Hearing.

As explained by Justice Rehnquist in Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 1914, 68 L. Ed. 2d 420 (1981), predeprivation notice and hearing protect against wrongful deprivation:

> "In all these cases, deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check the possibility that a wrongful deprivation would occur." 451 U.S. at 538, 101 S. Ct. at 1914.

In the present case there was no pre-seizure notice or hearing. The deprivation was in fact wrongful. The pleadings establish that the work of appellee North Bend was not related to the original construction of the boat. The boat was launched,[1] documented and licensed in November of 1979. Appellee North Bend provided services and materials from December, 1979 to May, 1980. Had appellants been given predeprivation notice and hearing, they could have presented their arguments to the court that the deprivation would be wrongful, and the deprivation would not have occurred.

III. Extraordinary Situations.

There are certain "extraordinary

---

[1]The complaint incorrectly states that the boat was launched on January 10, 1980 (App-11 to Motion to Dismiss).

situations" that would justify a postponement of notice and the opportunity for a hearing. Fuentes v. Shevin, 407 U.S. 67, 90-91, 92 S. Ct. 1983, 1999-2000, 32 L. Ed. 2d 556 (1972); Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 26 L. Ed. 2d 113 (1971). As this court explained in Fuentes:

> "These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of a legitimate force; the person initiating the seizure has been a government official responsibile for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U.S. at 90-91, 92 S. Ct. at 1992-2000. [Emphasis added.]

The only "extraordinary situation" which appellees could suggest is that a

boat can be sailed. This situation does not rise to the "truly unusual" level as required by this court in Fuentes. Logic dictates that there is no reason to distinguish a boat from any other form of movable personal property.

IV. Procedural Safeguards -- Sworn Affidavits of Claimants; Meaningful Judicial Participation and the Issuance of the Writ.

There were no sworn affidavits to support the complaint. The complaint consisted of mere conclusiory allegations. As appellees concede, the complaint was not verified. (Appellees' Motion to Dismiss or Affirm, p. 28). The court in the instant case issued a writ in the absence of all procedural safeguards to prevent mistake. There was no meaningful judicial participation in the issuance of the writ. There is even error evident on the face of the writ; it

recites that the complaint was verified when it was not (App. 8 to Motion to Dismiss).

V. Post-Seizure Hearing.

The Oregon Court of Appeals has attempted to engraft upon ORS 783.070 a provision for a post-seizure hearing, which would allow the property owner to contest the validity of the seizure. However, ORS 783.070 merely permits a boat owner to have the vessel released if the property owner posts the bond. There is no provision for a hearing to contest the validity of the seizure.

In the present case, there was no notice given to appellants of the opportunity for any post-seizure hearing. Appellants were served with no papers whatsoever advising them that a hearing could occur. The judicially-legislated right to a hearing can be no more than

illusory if the parties have no notice of it.

Appellees emphasize the fact that, under the principles of Mitchell v. W.T. Grant Company, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 1895 (1974), a statutory scheme which does not provide either notice or hearing prior to seizure still may satisfy the requirements of due process. However, appellees ignore that fact that, when there is no pre-seizure notice or hearing, Mitchell requires other procedural safeguards not present in this case. Mitchell requires pre-seizure safeguards against mistake and an appropriate post-seizure hearing under such circumstances.

Under the Louisiana sequestration statute in Mitchell, bare conclusory claims of lien do not suffice. Specific facts must be shown by verified petition or affidavit. 416 U.S. at 616, 94 S. Ct.

at 1904. Judicial involvement in the issuance of the writ must be significant:

> "[T]he requisite showing must be made to a judge, and judicial authorization obtained. Mitchell was not at the unsuperivsed mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the procedure from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking." 416 U.S. at 616-7, 94 S. Ct. at 1904-5.

Under the Louisiana sequestration statute, post-seizure safeguards are also required. Louisiana law "expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.'" 416 U.S. at 618, 94 S. Ct. at 1905. The burden of proof is on the claimant. There is no economic burden upon the property owner to post a bond.

Even if this Court accepts the position of the Oregon Court of Appeals that the post-seizure bond hearing is really a post-seizure hearing on the merits, there still must be additional protections against mistake both prior to seizure and at the post-seizure hearing. All such protections were lacking in this case. There was no verified complaint. There was no full and immediate hearing on the merits in which the burden was placed upon the claimant. Even under the construction of the seizure statute by the Oregon Court of Appeals, the statutory scheme provides insufficient due process protections.

VI. Adequate Bond Being Posted.

In the instant case, a $10,000 bond was posted to protect the sheriff of Coos County on the seizure of a boat worth $600,000. The court did not participate

meaningfully in the determination of the amount of the bond. The unverified complaint does not even specify the value of the boat; it merely itemizes the debt as $5,410.04. There were no affidavits submitted as to value. The record provides no support to justify the choice of the inadequate $10,000 figure for the bond. The statutory scheme provides no safeguards to ensure the adequacy of the bond.

CONCLUSION

The Oregon Court of Appeals has repudiated fundamental due process principles. Due process requires adequate notice and an opportunity to be heard. Mullane, supra. Neither was had in the present case.

The only due process protection appellees were given is the right to a judicially-legislated, post-seizure bond hearing. Even as construed by the Court

of Appeals, this hearing does not satisfy constitutional due process requirements. It is neither full nor immediate. It is not a hearing on the merits. The burden of proof is not placed upon the lien claimant. Instead of providing the property owner with an immediate forum for a full hearing on the merits of the claim, this hearing places the economic burden on the property owner of posting a bond. The property owner is required to buy his due process.

In addition, the statutory scheme requires no prior notice, no prior hearing, no adequate bond, no judicial review, no extraordinary situations, and no sworn affidavits of the claimant. This statutory seizure scheme is patently unconstitutional.

The questions presented by this appeal are substantial. Rocky B. Fisheries and its two shareholders urge

this court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

DATED this 7th day of September, 1984.

Respectfully submitted,

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